TABLE OF CONTENTS

	Joint Appendix Pages
ABBREVIATED INDEX:	
Joint Petition for Review	1
Transcript of Hearing (excerpts)	19
Exhibit No. 1 (System Map, Houston Pipe Line Co.)	73
Exhibit No. 2 (Houston-El Paso contract)	75
Exhibit No. 4 (Argo-Houston contract)	112
Exhibit No. 6 (El Paso map)	115
Exhibit No. 7 (El Paso flow diagram; aver. day)	116
Exhibit No. 8 (El Paso flow diagram; max. day)	117
Exhibit No. 9 (El Paso flow diagram; design cap.)	118
Exhibit No. 10 (El Paso flow diagram; Permian field)	119
Item B (El Paso system map)	120
Lo-Vaca application for certificate	121
Houston petition for declaratory order	179
Intervention by People and P.U.C. of California	197
Order for hearing and consolidation	201
Initial Decision of Presiding Examiner	204
Exceptions by People and P.U.C. of California	238
Opinion determining jurisdiction	254
Houston application for rehearing	277
El Paso application for rehearing	289
Lo-Vaca application for rehearing	317
Order denying rehearing	332

	Record Pages	Joint Appendix Pages
DETAILED INDEX:		
JOINT PETITION FOR REVIEW OF OPINION AND ORDER OF FEDERAL POWER COMMISSION		1
Lo-Vaca Gathering Company Houston Pipeline Company El Paso Natural Gas Company		
Parties		2
Statement of Jurisdiction and Venue		3
Commission Action of Which Review Is Sought		5
Grounds Upon Which Relief Is Sought		12
Appendix		
Public—No. 688—75th Cong., 3d Sess., H.R. 6586		14
EXCERPTS FROM TRANSCRIPT OF THE HEARING	1	19
Jack Ware		
direct examination	20	19
Letter concerning contracts	23	22
cross-examination	33	24
redirect examination	204	57
recross-examination	217	58
John H. Wimberly		
direct examination	103	27
cross-examination	114	33
further cross-examination	168	50
redirect examination	201	56
recross-examination	202	57
Barry Hunsaker		
direct examination	133	35
cross-examination	265	59
EXHIBITS		
No. 1— System Map of Houston Pipe Line Co.	415	73
No. 2—Contract for purchase and sale of gas between Houston Pipe Line Company and El Paso Natural Gas Company	416	75

	Record Pages	Joint Appendix Pages
Article I—Definitions	419	76
Article II—Limitations and Covenants	421	78
Article III—Conditions and Rights to Terminate	423	80
Article IV—Delivery Point and Facilities	426	82
Article V—Quantities	427	83
Article VI—Pressure and Quality	433	89
Article VII—Measurement	433	89
Article VIII—Meter Test	435	91
Article IV—Heat Content	437	93
Article X—Price	438	94
Article XI—Taxes	442	97
Article XII—Billing and Payment	443	98
Article XIII—Term	444	99
Article XIV—Force Majeure	445	100
Article XV—Impairment of Deliveries	447	102
Article XVI—Transport Gas	448	103
Article XVII—Interstate Commerce	449	104
Article XVIII—Warranties of Title	454	108
Article XIX—Notices	455	109
Article XX—Successors and Assigns	455	109
Article XXI—Miscellaneous	456	110
No. 4—Gas Purchase Contract; Argo Oil Corporation—Houston Pipe Line Company, November 15, 1958		
Article XVII—Sales by Buyer in Interstate Commerce	459	113
No. 6—Map showing location of El Paso Natural Gas Co.'s Permian Basin system and portions of El Paso's mainline system	485	115
No. 7—Flow diagram—average day, utilization of South Texas gas for plant fuel, El Paso Natural Gas Company, South Texas Project	486	116
No. 8—Flow diagram—maximum day, utilization of South Texas gas for plant fuel, El Paso Natural Gas Company, South Texas Project	487	117

	Record Pages	Joint Appendix Pages
No. 9—Flow diagram showing southern system design capacity, El Paso Natural Gas Company, South Texas Project	488	118
No. 10—Flow diagram showing Permian Field design capacity, El Paso Natural Gas Company, South Texas Project	489	119
ITEMS BY REFERENCE		
Item B—System Map, El Paso Natural Gas Co., from filing in Docket No. CP61-26, Book 2, Ex. F, Tab. 1	494	120
APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY BY LO-VACA GATHERING CO.	812	121
Exhibit A (Proposed Gas Gathering Facilities)	818	127
Exhibit B-1 (Gas Purchase Contract between El Paso and Lo-Vaca, March 15, 1960)	820	129
Articles:		
I Definitions	822	129
II Dedication	822-A	120
III Govenmental Authority	824	132
IV Quantity	825	133
V Quality	828	136
VI Delivery Point and Pressure	829	137
VII Meters	830	138
VIII Unity of Volume	832	140
IX Measurement	833	140
X Price	834	141
XI Billing and Payment	835	142
XII Taxes	836	143
XIII Term	837	145
XIV Gas Reserves	838	145
XV Title	841	148
XVI Use of Gas	842	149
XVII Force Majeure	842	149
XVIII Rules and Regulations	844	151

		Record Pages	Joint Appendix Pages
XIX	Notices	844	151
XX	Successors and Assigns	844	151
XXI	Topical Headings	845	152
Exhibit B-2 (Gas Purchase Contract between El Paso and Lo-Vaca, May 16, 1960)		847	153
Articles:			
I	Definitions	849	154
II	Dedication	850	155
III	Governmental Authority	852	156
IV	Quantity	853	158
V	Quality	856	161
VI	Delivery Point and Pressure	857	161
VII	Meters	858	162
VIII	Unity of Volume	860	164
IX	Measurement	861	165
X	Price	862	166
XI	Billing and Payment	863	167
XII	Taxes	864	167
XIII	Term	866	169
XIV	Gas Reserves	866	169
XV	Title	869	172
XVI	Force Majeure	870	173
XVII	Rules and Regulations	871	174
XVIII	Notices	871	175
XIX	Successors and Assigns	872	175
XX	Additional Sales	873	176
XXI	Topical Headings	873	176
Exhibit B-3 List of contracts dedicated to sale to El Paso; gas dedicated by Lo-Vaca to El Paso		874	177
Exhibit C Contract Summaries		876	178
Contract of March 15, 1960		877	178
Contract of May 16, 1960		878	178
PETITION OF HOUSTON PIPE LINE COMPANY FOR A DECLARATORY ORDER TO REMOVE UNCERTAINTY, DEC. 23, 1960		907	179

	Record Pages	Joint Appendix Pages
Exhibit C (Schematic diagram of facts in State of North Dakota v. FPC, 247 F. 2d 173 (1957))	925	193
Exhibit D (Schematic diagram of facts in City of Hastings, Neb. v. FPC, 221 F. 2d 31 (1954))	926	194
Exhibit E (Schematic diagram of facts in Okla. Natural Gas Co., G-19493; Consol. Gas Util. Corp., G-19494)	927	195
NOTICE OF INTERVENTION OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, FEBRUARY 27, 1961	938	197
ORDER for hearing and Consolidating Proceedings, issued February 24, 1961	946	201
INITIAL DECISION of Presiding Examiner, upon Application and Petition to Declare Certain Restricted-Use Gas Contracts to be Nonjurisdictional, issued August 11, 1961	994	204
EXCEPTIONS OF PEOPLE OF STATE OF CALIFORNIA AND PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA TO THE PRESIDING EXAMINER'S DECISION, DATED AUGUST 29, 1961	1052	238
OPINION and ORDER Determining Jurisdiction, Opinion No. 348, issued October 23, 1961	1100	254
Dissenting opinion of Commissioner O'Connor	1114	274
APPLICATION OF HOUSTON PIPE LINE COMPANY FOR REHEARING	1117	277
APPLICATION OF EL PASO NATURAL GAS COMPANY FOR REHEARING	1132	289
APPLICATION OF LO-VACA GATHERING COMPANY FOR REHEARING	1163	317
ORDER denying Rehearing, issued December 12, 1961	1184	332
Dissent of Commissioner O'Connor	1185	334

	Original	Print
Minute entry of argument and submission (omitted in printing)	382	365
Opinion, Cameron, J.	383	365
Dissenting opinion, Rives, J.	394	372
Judgment	402	377
Petition for rehearing en banc	406	378
Order denying petition for rehearing	467	379
Clerk's certificate (omitted in printing)	468	380
Order extending time to file petition for writ of certiorari in case of *Federal Power Commission* v. *Lo-Vaca Gathering Company, et al.*	469	380
Orders allowing certiorari	470	380

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19478

LO-VACA GATHERING COMPANY,
HOUSTON PIPELINE COMPANY,
EL PASO NATURAL GAS COMPANY,
Petitioners,

v.

FEDERAL POWER COMMISSION, *Respondent.*

On Joint Petition for Review of Opinion and Order of Federal Power Commission

JOINT APPENDIX

To the United States Court of Appeals for the Fifth Circuit and the Honorable Judges Thereof:

Come now Lo-Vaca Gathering Company, Houston Pipe Line Company, and El Paso Natural Gas Company (herein collectively termed "Joint Petitioners") pursuant to Section 19(b) of the Natural Gas (Act)[1], 15 U.S.C. 717r(b),

[1] Act of June 21, 1938, c. 556, 52 Stat. 821, 15 U.S.C. §§ 717-717w, inclusive. The specific sections of the Act which are cited in this petition are set forth *verbatim* in the appendix.

and file this joint petition for review of an opinion and order of the Federal Power Commission (Commission) issued October 23, 1961, in *Lo-Vaca Gathering Company, et al.* Docket Nos. CI60-693, *et al.* (Opinion No. 348). By this opinion and accompanying order the Commission determined certain proposed sales by Lo-Vaca Gathering Company (Lo-Vaca) and Houston Pipe Line Company (Houston) to the El Paso Natural Gas Company (El Paso) to be subject to its regulatory jurisdiction. Joint Petitioners are aggrieved by such determination and petition this Court to review and set aside the Commission's opinion and order. In support whereof, Joint Petitioners show as follows:

I

Parties

Lo-Vaca is a corporation organized and existing under the laws of the State of Texas, having its principal place of business at the Petroleum Tower, Corpus Christi, Texas. Lo-Vaca's activities, facilities, and sales are all within the State of Texas. Pertinent here, Lo-Vaca proposes to make two separate sales of natural gas to El Paso. Delivery will be made at Three Rivers, Texas, to El Paso's affiliate, El Paso Gas Supply Company.

Houston is a corporation organized and existing under the laws of the State of Texas, having its principal place of business at The Petroleum Building, Houston, Texas. Houston has for many years been engaged in the intrastate purchase, transportation, and sale of natural gas all within the State of Texas. The gas sold by it either to distribution companies or to industrial and commercial customers is all produced and consumed entirely within the State of Texas.

El Paso is a Delaware corporation with its principal place of business in El Paso, Texas. Among other opera-

tions, El Paso is engaged in transportation and sale of natural gas for resale in interstate commerce as well as the consumption of natural gas in its own facilities both within and outside the State of Texas. El Paso is a "natural-gas company" within the meaning of that term as defined by Section 2(6) of the Natural Gas Act.

Respondent is a Commission created and existing under the laws of the United States. Its membership is composed of Joseph C. Swidler, Chairman, Howard Morgan, Lawrence J. O'Connor, Jr., and Charles S. Ross.[2] These Commissioners are the duly-appointed, qualified, and acting members of the Commission. The Commission and its members are charged with the responsibility of administering the Natural Gas Act. The principal office of the Commission is at 441 G Street, N. W., Washington 25, D. C.

II

Statement of Jurisdiction and Venue

This petition for review is filed pursuant to the provisions of Section 19(b) of the Natural Gas Act of June 21, 1938, c. 556, 52 Stat. 821, 15 U.S.C., § 717r(b), which provides in part, as follows:

> "(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of

[2] The Federal Power Act which established the Federal Power Commission provides for five Commissioners. (See, Act of June 10, 1920, c. 285, § 1, 41 Stat. 1063, as amended, 16 U.S.C. 792.) At the date of issuance of the opinion and order of which review is sought Jerome K. Kuykendall was a member of the Commission. Mr. Kuykendall resigned from the Commission effective January 1, 1962. Mr. Harold C. Woodward has been nominated to fill the vacancy.

business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part."

On June 1, 1960, Lo-Vaca filed an application for a certificate of public convenience and necessity, pursuant to Section 7(c) of the Act seeking authorization, in accordance with a contract dated March 15, 1960, to gather and deliver to El Paso, at Three Rivers in Live Oak County, Texas, certain supplies of natural gas which it proposed to purchase in Live Oak, Goliad, Lovaca, and adjacent counties in Texas. Lo-Vaca did not seek certificate authority for the sale of these volumes. By the same application, Lo-Vaca also sought authorization, in accordance with a separate contract dated May 16, 1960, to deliver and sell to El Paso certain additional supplies which it proposed to purchase in the same producing area.

On December 27, 1960, Houston filed a petition requesting that the Commission enter an order declaring that neither it nor the sellers from whom it purchases gas would become natural gas companies subject to the jurisdiction of the Commission by reason of a sale of natural gas which it proposed to make to El Paso. Houston's sales contract provided that the gas which would be produced in Texas, purchased by Houston and delivered by it to El Paso at Three Rivers in Live Oak County, Texas, would be consumed wholly in Texas.

By order issued February 24, 1961, the Commission set these matters for consolidated hearing limiting the issues to be heard "to the question of the Commission's jurisdiction over the proposed sale of gas by Houston for use as fuel in El Paso's facilities in Texas and in Phillips' gaso-

line plant in Ector County, Texas, and over the proposed sale of gas by Lo-Vaca for use as fuel in El Paso's facilities outside Texas."

By order issued March 15, 1961, the Commission permitted El Paso, among others, to intervene as a party in the consolidated proceedings.

After due hearings the presiding examiner issued his initial decision on August 11, 1961, in which he concluded that the proposed sale by Houston would not be subject to the Commission's jurisdiction, but that the proposed sale by Lo-Vaca would be jurisdictional.

Subsequently, after the filing of exceptions, the Commission in its Opinion No. 348 issued October 23, 1961, modified the examiner's decision and determined that both the sale by Lo-Vaca and the sale by Houston would be subject to its jurisdiction as sales for resale in interstate commerce. Pursuant to Section 19(a) of the Act, each of the petitioners herein filed application for rehearing. And, on December 12, 1961, the Commission denied rehearing.

This joint petition for review is being filed within 60 days after the Commission's denial of rehearing. On these facts, jurisdiction and venue for purposes of review of the Commission's opinion and order issued October 23, 1961, are established in this Court by the provisions of Section 19(b) of the Act.

III

Commission Action of Which Review Is Sought

In its Opinion No. 348 issued on October 23, 1961, the Commission determined that the "sale and delivery of natural gas by Lo-Vaca and Houston * * * would result in Lo-Vaca and Houston being engaged in the transportation of natural gas in interstate commerce, and in the sale

in interstate commerce of such gas for resale, and Lo-Vaca and Houston thereby would become natural gas companies within the meaning of the Natural Gas Act, and their respective sales to El Paso would be subject to our jurisdiction." Accordingly, it denied Houston's petition for an order determining that neither Houston nor the sellers of gas to Houston would become natural gas companies subject to the Commission's jurisdiction by reason of the proposed sale by Houston to El Paso.

Both Lo-Vaca and Houston contend that their proposed sales to El Paso are not sales for resale in interstate commerce within the meaning of Section 1(b) of the Act. El Paso joins Lo-Vaca and Houston in these contentions.

Although the two proceedings of which review is sought were consolidated for hearing and decision and the statutory language to be applied in determining jurisdiction is the same, the facts of the Lo-Vaca sale in Docket No. CI60-693 are significantly different from the facts of the Houston sale in Docket No. CP61-177. In essence, Lo-Vaca proposes to make a sale of gas to be restricted to El Paso's own use outside the State of Texas. On the other hand, Houston would make a sale for resale, but all volumes delivered by Houston to El Paso would be restricted for use within the State of Texas.[3] But the two sales must be considered in the context of Section 1(b) of the Act which limits Commission jurisdiction over sales to those transactions which satisfy the dual requirements, namely, (1) that they must be sales in interstate commerce and (2) that they must be sales for resale. Thus, although Lo-Vaca's sale would be in interstate commerce, it would not be a sale for resale and hence would not fall within the

[3] A small portion of the gas to be sold by Houston to El Paso would be resold to Phillips Petroleum Company for use as fuel in the Phillips Goldsmith Plant in Ector County, Texas.

scope of Commission jurisdiction over sales under Section 1(b) of the Act. Thus. although Houston's sale would be a sale for resale, it would not be a sale in interstate commerce and again the jurisdictional prerequisites of Section 1(b) would not be met.

Because of the foregoing distinction between the two proposals, the facts of each sale are treated separately below:

Lo-Vaca's sale.

In its application in Docket No. CI60-693, Lo-Vaca requested a certificate of public convenience and necessity to authorize two proposed operations. First, under contract of March 15, 1960, herein referred to as Lo-Vaca's restricted-use contract, Lo-Vaca proposes to gather gas from certain producers and deliver 50,000 Mcf per day to El Paso at Three Rivers, Texas. From this point the gas would be transported by El Paso Gas Supply Company to El Paso's Sonora Plant, in Sutton County, Texas, where it would enter El Paso's system. Here the gas would be commingled with other supplies, some of which would be resold for consumption outside the State of Texas. Importantly, Lo-Vava did not seek authorization for the restricted-use sale, but only for the delivery of the restricted-use gas to El Paso. However, it is the sale of this restricted-use gas which the Commission has determined to be a sale for resale in interstate commerce, and this determination is the subject of Lo-Vaca's petition for review.

At this juncture an important difference between the Lo-Vaca and Houston proposals should be noted. Lo-Vaca requested certificate authority for delivery of its restricted-use gas to El Paso on the theory that the gas was destined for out-of-state consumption by El Paso. As such, this delivery is concededly transportation in interstate com-

merce subject to the Commission's jurisdiction under Section 1(b) of the Act. In contrast, however, Houston did not seek certificate authority for its delivery of gas to El Paso since, by contract, its gas would be destined for consumption within the State of Texas.

Secondly, Lo-Vaca sought authorization in Docket No. CI60-693 to deliver and sell an additional 80,000 Mcf of natural gas per day under a contract of May 16, 1960, herein referred to as Lo-Vaca's non-restricted use contract. No issue is before the Court concerning this sale.

The question presented by Lo-Vaca's petition is a narrow one. It relates solely to the jurisdictional status of the restricted-use sale. As noted previously, no question is raised with respect to the Commission's determination that the delivery of the gas by Lo-Vaca to El Paso would be transportation in interstate commerce and hence subject to the Commission's jurisdiction. The restricted-use contract provides, in part, as follows:

"ARTICLE XVI"
"use of Gas"

> "All of the gas to be purchased by El Paso from Gatherer [Lo-Vaca] under this agreement shall be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps and other facilities located outside the State of Texas. It is understood, however, that said gas will be commingled with other gas being transported in El Paso's pipe line system."

It is the contention of the Petitioners that this restricted-use sale to El Paso is not subject to Commission jurisdiction because it is not a sale for resale. It is a direct sale for El Paso's own us. The fact that the gas, which is a

fungible commodity, would be physically commingled with other gas in El Paso's system does not change the character of the transacation nor transform the direct sale into a sale for resale. Further, since this sale is the subject of a separate contract which does not include any gas for resale, the Commission's ability to maintain its jurisdiction over all sales for resale in interstate commerce is not jeopardized in any manner by its inability to regulate this sale.

Houston's sale.

In its Petition for a Declaratory Order to Remove uncertainty filed December 27, 1960, in Docket No. CP61-177, Houston detailed the facts of its proposed sale to El Paso. At the outset Houston noted that it had covenanted with the producers from whom it acquired gas not to introduce the gas into interstate commerce. Thus, a typicial restriction as set forth in the petition reads as follows:

> XVII. Sales by Buyer in Interstate Commerce.
>
> "17.1 Buyer [Houston] represents that Buyer has no present desire or intention that the gas delivered to Buyer by Seller hereunder be transported in interstate commerce or sold for resale in interstate commerce. If because of changed conditions which Buyer cannot now foresee, Buyer should desire to transport or sell gas delivered hereunder into interstate commerce, Buyer shall give Seller not less that sixty (60) days' prior written notice of its intention to sell or deliver any gas purchased hereunder for transportation, sale or resale in interstate commerce, as such term is defined in the Natural Gas Act (June 21, 1938, c. 556, Sec. 24, 52 Stat. 833, Ch. 1513, Title 15, U.S. C.A.), as heretofore or hereafter amended, or in substitute legislation covering the same or similar subject

matter, and notwithstanding any other provision hereof, Seller shall have and is hereby given the continuing right and option to cancel and terminate this contract at any time during the period of fifty-five (55) days next following the receipt by Seller of any such notice from Buyer by the giving of written notice of such cancellation and termination to Buyer within such period of time, but not thereafter."

Accordingly, in their contract of July 19, 1960, Houston and El Paso agreed that all gas would be "used and consumed by El Paso solely as fuel in the operation of El Paso's plant and in the gasoline plant of Phillips Petroleum Company in Ector County, all located wholly within the State of Texas". However, it was recognized that any gas purchased from Houston "for such fuel consumption within Texas must necessarily be commingled with other gas being transported by El Paso in its pipe line system".

Pursuant to other contract terms, Houston agreed to deliver an average of 70,000 Mcf of natural gas per day to El Paso at Three Rivers, Texas. At this point El Paso, through its affiliate, El Paso Gas Supply Company, would accept delivery of gas and transport the volumes together with volumes to be received from Lo-Vaca, to El Paso's Sonora Plant in Sutton County, Texas, where the gas would enter El Paso's system and be commingled with additional volumes of gas destined for out-of-state consumption. However, the contract provides that a volume equal to, or in excess of, the volume delivered by Houston to El Paso, will, at all times, either be consumed by El Paso in its fuel consuming facilities within the State of Texas or will be delivered by El Paso to Phillips Petroleum Company for use at the latter's Goldsmith gasoline plant in Ector County, Texas.

With respect to Houston's sale, Petitioners contend that it is not subject to Commission jurisdiction because it is not a sale in interstate commerce. Since all gas would be consumed within the State of Texas where it would be produced, the sale would be made in intrastate commerce. Physical commingling of Houston's gas with other volumes in El Paso's system does not change the intrastate character of the sale. Like Lo-Vaca sale, Houston's contract involves the sale of a fungible commodity under a contract which relates only to gas which is not subject to Commission jurisdiction. The sale of this gas by Houston is under a contract which is wholly unrelated and entirely separate from any other gas purchase contract with respect to which Commission jurisdiction attaches and the Commission's inability to regulate Houston's sale would not jeopardize the ability to maintain its jurisdiction over all sales for resale in interstate commerce.

Commission Decision.

In its Opinion No. 348, the Commission decided that it would have jurisdiction over the sales by Lo-Vaca and by Houston. In a patently selective assertion of jurisdiction, its *ratio decidendi* appears to be that because of commingling the restricted-use gas would lose its legal identity; Lo-Vaca's direct sale would be transformed into a sale for resale, and Houston's sale in intrastate commerce would become a sale for resale in interstate commerce. Further, despite a disclaimer that it seeks to extend its jurisdiction beyond the limits of Section 1(b) of the Act, the Commission also claims authority over the sales by Lo-Vaca and Houston by reason of a purported effect of such sales upon other sales which are subject to its regulatory control. In reaching its decision, the Commission departed from numerous established court precedents including, *United States v. Public Utilities Commission of California*, 345 U.S. 295

(1953); *Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana*, 332 U.S. 507 (1947); *People's Natural Gas Company* v. *Public Service Commission of Pennsylvania*, 270 U.S. 550 (1926); *North Dakota* v. *Federal Power Commission*, 247 F. 2d 173 (8th Cir. 1957); *City of Hastings* v. *Federal Power Commission*, 221 F. 2d 31 (C.A.D.C. 1954); *Federal Tender Board No. 1* v. *Haynes Oil Corporation*, 80 F. 2d 468 (5th Cir. 1935).

IV

Grounds Upon Which Relief Is Sought

Joint Petitioners contend that the Commission's determination that their proposed sales to El Paso would be sales for resale in interstate commerce is contrary to law. Joint Petitioners further contend that the Commission's determination that Lo-Vaca and Houston would become natural-gas companies within the meaning of that term as used in the Natural Gas Act by reason of their proposed sales is likewise contrary to law. Being aggrieved by such determinations, Joint Petitioners urge that the Commission committed error in the following respects:

(1) In determining Lo-Vaca's proposed sale of natural gas restricted to El Paso's own use would be a sale for resale in interstate commerce;

(2) In failing to conclude that Lo-Vaca's proposed sale to El Paso would be a direct-use sale and hence not subject to the Commission's jurisdiction;

(3) In determining Houston's sale of natural gas restricted to consumption in the State of Texas would be a sale for resale in interstate commerce;

(4) In failing to conclude that Houston's proposed sale to El Paso would be a sale in intrastate commerce and hence not subject to the Commission's jurisdiction;

(5) In failing to conclude that Lo-Vaca would require a certificate of public convenience and necessity only for the delivery but not for the sale of its restricted-use gas to El Paso; and

(6) In failing to conclude that Houston would not require a certificate of public convenience and necessity to make its proposed restricted-use sale to El Paso.

V

Relief Prayed

Wherefore, for all the foregoing reasons, Joint Petitioners pray:

(1) That the Clerk of this Court serve a copy of this Joint Petition upon the Respondent, Federal Power Commission, at its official address at 441 G Street, N. W., Washington 25, D. C.;

(2) That this Court direct the Commission to file with the Clerk of this Court the official transcript of the record in the proceedings here sought to be reviewed;

(3) That this Court review the Commission's Opinion No. 348 and accompanying order issued October 23, 1961, and upon such review, to take the following action;

(a) reverse and set aside said Opinion and order;

(b) determine and declare that the restricted-use sale proposed by Lo-Vaca would not be a sale for resale in interstate commerce, and that the restricted-use sale proposed by Houston would not be a sale in interstate commerce;

(c) determine and declare that the restricted-use sales proposed by Lo-Vaca and Houston would not be subject to the jurisdiction of the Commission; and

(d) determine and declare that Lo-Vaca and Houston would not become natural-gas companies within the meaning of the Natural Gas Act by reason of their proposed restricted-use sales to El Paso; and

(4) That this Court exercise jurisdiction over the parties and subject matter of this Joint Petition and grant to the Petitioners such other and further relief in the premises as the rights and equities of the cause may require.

Respectfully submitted,

LO-VACA GATHERING COMPANY
HOUSTON PIPE LINE COMPANY
EL PASO NATURAL GAS COMPANY
By /s/ BRADFORD ROSS
Bradford Ross
Ross, Marsh & Foster
725-15th Street, N. W.
Washington 5, D. C.

February 6, 1962

APPENDIX

[Public—No. 688—75th Congress]
[Chapter 556—3d Session]
[H. R. 6586]

Section 1. (b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or

gatering of natural gas. [52 Stat. 821 (1938); 15 U.S.C. § 717(b)]

• • • • • • • • • • •

Sec. 2. When used in this act, unless the context otherwise requires—

(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

• • • • • • • • • • •

Sec. 7. (c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construtcion or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: Provided, however, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: Provided, however, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f (c)]

• • • • • • • • • • •

Sec. 7. (c) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public con-

venience and necessity may require: [56 Stat. 84 (1942); 15 U.S.C. § 717f (e)]

• • • • • • • • • • •

Sec. 19 (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, States, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this Act.

Sec. 19 (b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Com-

mission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254).

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1

BEFORE THE FEDERAL POWER COMMISSION

Docket No. C160-693

In the Matters of:
LO-VACA GATHERING COMPANY

Docket No. CP61-177

HOUSTON PIPE LINE COMPANY

Hearing Room D
Federal Power Commission
441 G Street, Northwest
Washington, D. C.

Tuesday, March 21, 1961

The above-entitled matters came on for hearing, pursuant to notice, at 10 o'clock a.m.

BEFORE:

Robert E. Freer, Presiding Examiner.

* * * * * * * * * * *

20

Jack Ware

was called as a witness and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Ross:

Q. Mr. Ware, will you please state your full name and address? A. My name is Jack Ware. My address is 200 Petroleum Tower, Corpus Christi, Texas.

Q. Will you state whether or not you are employed by

Lo-Vaca Gathering Company? A. Yes, sir, I am, as vice president.

Q. Are you familiar with the application for a certificate of public convenience and necessity which was filed by Lo-Vaca Gathering Company with the Federal Power Commission at Docket No. CI60-693? A. I am.

Q. I want to be sure I have the right number. That is correct. A. Yes, I am familiar with that.

Q. Are the facts therein alleged true and correct to

the best of your knowledge? A. They are.

Q. The contracts that are attached to that certificate application are for the sale and delivery of gas to El Paso Natural Gas Company; is that correct? A. Yes, sir.

Q. There are two contracts and I wonder if you would tell us the dates at which they were executed? A. The contract calling for the delivery of 50 million for use by El Paso within its own system was executed in March. The other contract, the one that has no restrictions on it—March 15th to be exact is the date of the first one. The second one, the one without any restrictions as to use by El Paso is dated the 16th day of May, 1960.

Q. And referring to the contract dated March 15, 1960, does that provide a restriction with regard to the use to be made of the gas by El Paso? A. Yes, sir, it does. It is set out in Article 16 at page 22 under the heading "Use of Gas," and in that article it says that all of the gas purchased by El Paso is to be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps and other facilities located outside of the State of Texas.

Q. Is there any such restriction in the contract dated May 16, 1960?

22

A. No, sir, there is not.

Mr. Ross: At this point, I ask Your Honor that there be marked for identification as Item A by reference, the application and attachments filed by Lo-Vaca in this proceeding.

Presiding Examiner: It may be so marked for identification.

(The documents above referred to were marked for identification, Item A, by reference)

By Mr. Ross:

Q. Mr. Ware, are you familiar with the letter dated November 25, 1960, addressed to Honorable Joseph H. Gutride, Secretary of the Federal Power Commission, which was signed by Bradford Ross as attorney for Lo-Vaca Gathering Company? A. Yes, sir, I am.

Q. Does that letter state the position of Lo-Vaca Gathering Company in this proceeding in response to an inquiry made by the Federal Power Commission of El Paso Natural Gas Company? A. Yes, sir, it does.

Mr. Ross: This is a very short letter, Your Honor, and I would like to ask the witness to just read the letter into the record.

The Witness: The letter is addressed to Honorable

23

Joseph H. Gutride.

(The letter referred to is as follows:)

(23)

Law Offices of
Ross, Marsh & Foster
725 Fifteenth Street
Washington 5, D. C.

November 25, 1960

Honorable Joseph H. Gutride
Secretary
Federal Power Commission
Washington 25, D. C.

Re: Lo-Vaca Gathering Company

Docket No. CI60-693

Dear Mr. Gutride:

This responds to your letter of October 19, 1960, to El Paso Gas Supply Company, Docket No. CP60-101, with copy to Lo-Vaca Gathering Company, which letter requested a statement of Lo-Vaca's position regarding Commission jurisdiction over Lo-Vaca in this proceeding.

As is shown by its application dated June 1, 1960, Lo-Vaca Gathering Company proposes to make two sales to El Paso Natural Gas Company (El Paso) pursuant to the terms of agreements dated March 15, 1960 and May 16, 1960, copies of which were attached to the application.

The gas purchase agreement dated May 16, 1960, contains no restrictions upon the use of the gas by the buyer; it is a sale for resale in interstate commerce within the Commission's

24

jurisdiction under section 1(b) of the Natural Gas Act. The gas purchase agreement dated March 15, 1960, contains, in Article XVI, a provision stating that all of the

gas to be purchased by El Paso from Lo-Vaca under this contract shall be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps and other facilities located outside of the state of Texas. This latter transaction is thus other than a sale for resale under section 1(b) of the Natural Gas Act and therefore is not subject to the Commission's jurisdiction.

Regardless of whether or not the Commission has jurisdiction Lo-Vaca intends to deliver the contractual volumes under both of its contracts with El Paso, reserving, however, its right to contest any Commission determination with respect to jurisdiction or any other matter in this proceeding.

Very truly yours,

LO-VACA GATHERING COMPANY
By Bradford Ross
Its Attorney

Presiding Examiner: The date of that?
The Witness: Is November 25, 1960.

By Mr. Ross:

Q. Mr. Ware, did you participate in the negotiations of the two contracts with El Paso Natural Gas Company?

A. Yes, sir, I did.

Q. Were those negotiations undertaken separately for each of those contracts? A. Yes, sir. The negotiations were commenced on the contract that was consummated and signed the 15th of March, along in the month of February, preceding February of 1960, and consummated in a contract, as I said, signed on the 15th of March.

Then, at some time later than February, in fact, I believe it was about the time that the March 15th contract

was actually executed, negotiations were commenced on the contract that was finally executed in May.

Q. Is it true that the gas which is being sold to El Paso Natural Gas Company will in fact be delivered to El Paso Gas Supply Company, a subsidiary of El Paso Natural Gas Company? A. That is my understanding of it, yes, sir.

Q. And can you state whether or not the deliveries of the gas under these two contracts will be separately metered? A. It will be separately metered, yes, sir.

Q. And will you state whether or not the gas which is going to be delivered to El Paso Gas Supply Company by Lo-Vaca with all be purchased or produced in the State of Texas?

26

A. Yes, sir, it will.

Q. None of the gas will come from outside of the State of Texas, is that correct? A. None, no, sir.

Mr. Ross: That completes the direct testimony.

• • • • • • • • • • •

33

Cross-Examination

By Mr. Knight:

Q. Mr. Ware, I believe you stated that Lo-Vaca's gas will be delivered to El Paso Gas Supply Company at a point near Three Rivers, Texas, in—what county is that? A. Live Oak County.

Q. Live Oak County. A. Yes.

Q. Will that be a station to be constructed to be known as the Coquat Station? A. I don't know what El Paso intends to call their station, if you are referring to El Paso's station.

Q. Yes.

Will it be delivered to a compression station to be constructed by someone other than Lo-Vaca? A. I don't know that it will be a compressor station. All I know is the point of delivery by Lo-Vaca to El Paso Gas Supply Company. What they intend to construct, I do not know.

Q. Will you please describe in detail the facilities

34

through which and by which, by means of which, Lo-Vaca will make its deliveries of gas to the El Paso Gas Supply Company from Lo Vaca's pipeline to the pipeline of El Paso Gas Supply Company? A. Describe in detail the facility?

Q. Yes, sir. A. No, sir, I am not a pipeline engineer. I can't—

Q. That is, you do not know by means of what facilities Lo-Vaca will make deliveries of gas to the El Paso Gas Supply Company? Is that correct? A. By a pipeline.

Q. Is that all you know about the facilities by means of which the movement of gas from Lo-Vaca's pipeline will take place to the pipeline of El Paso Gas Supply Company? A. Mr. Knight, there will be pipelines constructed by Lo-Vaca in various counties in the State of Texas. These pipelines will be connected to the wellhead of various gas suppliers. That gas will move through those constructed facilities to the metering station where it is delivered to El Paso Gas Supply Company and their title passes to El Paso Gas Supply Company.

Q. Yes, sir.

So my question, Mr. Ware, is: I asked you if you could describe the facilities which will exist at that point of delivery by means of which and through which the gas will

35

pass from Lo-Vaca's pipeline into the pipeline of El Paso Gas Supply Company?

(35)

That does not encompass in that question your gathering facilities that you just described. It is limited to the facilities by which this gas will move from Lo-Vaca's pipeline to the pipeline of El Paso Gas Supply Company. What facilities will there be? A. There will be two meter runs and two meters.

Q. Is that all? A. That is it.

Q. Just two meters? A. Together with the meter runs and pertinent block valve.

Q. That is what I wanted to find out about, all the block valves and everything, a complete description of the facilities that will be involved in the movement of the gas from Lo-Vaca's pipeline into the pipeline of El Paso Gas Supply Company, a complete description of all facilities. A. I have described it in the detail to which I am able to describe it.

Q. That is just two meters?

Mr. Ross: Now, he said there were two meter runs twice, I believe, Mr. Knight.

Mr. Knight: All right.

• • • • • • • • • •

37

Q. What I want is the description in detail of the facilities through which and by means of which the gas will pass from Lo-Vaca's pipeline into the pipeline of El Paso Gas Supply Company, a complete description of all those facilities regardless of ownership, and then we will come to the question of who owns those facilities. A. The meters will be installed and maintained by El Paso.

Q. El Paso Gas Supply Company? A. Yes, sir.

Presiding Examiner: Is that under the first contract?

The Wtiness: That is in Article 7 of the contract dated May 16th.

• • • • • • • • • •

64

Q. Now referring to the contract of May, 1960, have there been any amendments, modifications or changes of any sort affecting that contract? A. Only the one that I testified to earlier whereby the dedication of gas reserves was increased to make it a total of 640 billion cubic feet.

Q. That is instead of 400 billion there is a dedication of 640 billion, is that correct? A. Yes, sir.

Q. Did you mention that in connection with the March 1960 contract also? A. No, sir, I don't believe.

Q. That applies only to the May 1960 contract? A. Yes, this is the May contract.

Q. And those reserves are different for each contract,

65

aren't they? That is the reserves underlying the March contract are not part of the reserves underlying the May contract, is that correct? A. No, sir, they are not.

Q. They are separate? A. Yes, sir.

Q. Thank you.

* * * * * * * * * *

103

John H. Wimberly

was called as a witness, and having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Giller:

Q. Mr. Wimberly, would you please state your full name and address? A. My name is John H. Wimberly, my address is 1106 Petroleum Building, Houston, Texas.

Q. What is your connection with Houston Pipe Line Company, sir? A. President.

104

Q. Would you please explain to the Examiner something about the background of Houston Pipe Line Company and its relation with Houston Natural Gas Company, whose name has been mentioned here and your relation with Houston Natural Gas Company? A. I am president of both companies. Houston Pipe Line Company is a wholly-owned subsidiary of Houston Natural Gas Corporation, both of which have been engaged over the years in a wholly intrastate business.

Q. What does Houston Pipe Line Company do? A. Houston Pipe Line Company is engaged in the transmission of gas from the wellheads to a relatively small number of industrial consumers and to a number of city gate stations serving distribution systems, serving some 100 cities and towns and communities along the Texas Gulf Coast, all of which are located within the State of Texas.

Q. Is it fair to say that Houston Pipe Line Company is engaged in the purchase, moving and sale of natural gas? A. Yes.

Q. And do you know in what state or states all of the gas purchased by Houston Pipe Line is produced? A. It is all produced in Texas, in the State of Texas.

Q. Do you know whether or not all the gas sold by Houston Pipe Line Company is consumed in the State of Texas? A. It is, I do know it.

105

Q. Mr. Wimberly, I hand you here a chart called "System Map, Houston Pipe Line Company, Drawing No. H-1212," are you familiar with it, sir? A. Yes, I am.

Q. What does it show?

Presiding Examiner. Do you want it identified now?

Mr. Giller: Yes.

Presiding Examiner: You ask that this be marked for identification as Exhibit No. 1?

Mr. Giller: Yes, sir.

(The document referred to was marked for identification as Exhibit No. 1.)

By Mr. Giller:

Q. Mr. Wimberly, with reference to the system map identified as Exhibit Houston No. 1, would you please state what is shown by the black section in the map of the United States and Texas in the upper left hand corner? A. That small-scale drawing shows the area along the Texas Gulf Coast that is served by Houston Pipe Line Company.

Q. What is shown by the black lines in the larger-scale map? A. Those black lines are the existing pipeline system of Houston Pipe Line Company.

Q. Are these all the lines of Houston Pipe Line Company? A. Yes, sir, they are. I say they are. I wouldn't

be certain that there is not an isolated stub to a field, which are shown by circles on here, which may not be shown on this map. I can state that the lines extended no further to the east nor any farther to the west than is shown on this map.

Q. What is this dotted or dashed line in the lower left hand corner, Mr. Wimberly? A. Those are a few lines owned by Houston Natural Gas Corporation, the parent company of Houston Pipe Line Company.

Q. And what is the dotted line shown at the west end? A. That is the El Paso Gas Supply line, as I understand it, which is proposed to be built down to Three Rivers, Texas.

Q. What are the red lines, sir? A. That red line between George West and Three Rivers is the line we propose to build to make this delivery of gas to El Paso.

The other red line below that is a line which simply ties in the end of an existing line with the southern end of the other line as shown on the map, the Houston Pipe Line lines.

Q. Thank you sir.

Mr. Wimberly, I hand you here a document labeled on the first page "Contract for purchase and sale of gas between Houston Pipe Line Company and El Paso Natural Gas Company." Are you familiar with that document, sir? A. Generally, I am, yes, sir.

What is that document, Mr. Wimberly? A. It is, as you have just stated it, a contract between Houston Pipe Line Company and El Paso Natural Gas Company.

Mr. Giller: May I have this marked for identification?

Presiding Examiner: The contract may be marked for identification as Exhibit 2.

(The document above described was marked for identification as Exhibit No. 2.)

By Mr. Giller:

Q. Is this the contract under which Houston Pipe Line

Company will sell gas to El Paso Gas Supply Company—excuse me, El Paso Natural Gas Company? A. It is.

Q. And is it because of this contract that the red line on—correction, the new pipeline on the Houston Exhibit No. 1 going up to Three Rivers will be built? A. Yes, sir, it is.

Mr. Giller. At this time I would like to offer into evidence Houston's Exhibit No. 1 and No. 2.

Presiding Examiner: Perhaps we had better, unless there is no objection, we had better wait until we have had cross-examination. But if nobody objects—they may be received in evidence.

(The documents heretofore identified as Exhibit Nos. 1 and 2 were received in evidence.)

By Mr. Giller:

Q. Mr. Wimberly, has the contract with El Paso Natural, that is, Houston's Exhibit No. 2, been amended, sir? A. No, sir, it has not. This is the contract as it stands right here. No amendments, no alterations or deletions, this is it.

Q. Is that the only agreement, the only contract, or all or otherwise, between Houston Pipe Line Company and El Paso Natural Gas Company concerning this entire transaction? A. It is.

109

Q. Does that contract restrict the use of the gas to be made by El Paso Natural, sir? A. Yes, sir, it does.

Q. Why is that, sir? A. Why is it?

Q. Yes, sir. A. It is because in our gas supply contracts there is a provision that the gas we buy from producers must not be used for delivery in interstate commerce. Of course, that one thing prohibits our selling any gas in interstate commerce.

Q. Referring now to the map, Houston Exhibit No. 1, would you please tell the Examiner from where the initial supply of gas will come that will be delivered to El Paso Natural Gas Company at Three Rivers? A. Yes, sir. Initially, we make all of the deliveries from the line that runs in a southwesterly directly from George West, showing some six or seven fields connected to it.

Q. Would you please take the official copy and draw a

circle around that line that you have referred to as being the source of gas for the initial deliveries, and just write "initial source of delivery." A. Write on here?

Q. Yes, "initial source of supply."

110

Q. Mr. Wimberly, does Houston Pipel Line Company buy gas from Argo Oil Corporation at a point along this stub you have circled—this short line you have circled, called "Initial source of supply" on Houston Exhibit No. 1? A. Yes, sir, it does.

Q. I hand you here a copy of a contract and ask you if you are familiar with it, sir? A. Generally, I am, yes, sir.

Q. What is that, please? A. A contract between Argo Oil Corporation and Houston Pipe Line Company.

Q. For what? A. For the sale and delivery by Argo to Houston Pipe Line for this gas in McMullen County, which is on the far end of the line shown on the map in the area I have just circled.

Q. That is an existing contract, is it, sir? A. Yes, sir. It has been in force for some time.

Q. I refer you now—

Presiding Examiner: Do you want this identified?

Mr. Giller: Excuse me, yes, sir. Would you please identify this as Houston's next exhibit, sir?

Presiding Examiner: This contract, so described, will be marked for identification as Exhibit No. 3

(The document above described was marked for identification as Exhibit No. 3.)

111

By Mr. Giller:

Q. You previously testified about some clauses between producers and Houston Pipe Line limiting the right of Houston Pipe Line to sell gas in interstate commerce. I

refer you now to Article XVII, on page 41 of this contract, Houston Exhibit No. 3, and ask you if that is such a clause, sir?

Mr. Knight: What page number is that, please?

Mr. Giller: Page 41.

The Witness: Page 41, Article XVII, Section 17.1.

By Mr. Giller:

Q. Yes, sir. Is that such a clause? A. Yes, sir. This is the provision that is in the contract and it has not been amended; it is in there now.

Q. This provision then, Article XVII of Houston Exhibit No. 3, has not been amended; is that correct? A. It has not.

Q. Do you know if the other contracts for supply of gas from which the initial supply will be made to El Paso Natural Gas Company have similar clauses? A. Each contract for the delivery of gas to Houston Pipe Line along the line I have circled from which all of the initial deliveries will come, all have the same or a similar provision in the contracts.

. . . . . .

114

Cross-Examination

. . . . . .

128

By Mr. Knight:

Q. In order that I may be sure not to be passing up anything that I ought to question Mr. Wimberly about, Mr. Wimberly, could you state briefly, please, what would be the scope of your testimony in this proceeding? That is, why you were called as a witness? A. As I understand it simply first of all to give to you and the Commission

(128)

the enterprise, the business of Houston Pipe Line, to testify that it buys gas only from producers in the field in Texas, that our entire gas supply, 100 percent of it is produced in the State of Texas, that we have no sales now, nor ever have had any that went interstate, that our sale to El Paso is restricted to use in Texas in compressor stations with the exception of the sale to Phillips for the operation of its gasoline plant in West Texas, to the effect that El Paso has provided in this contract or it is provided in the conract that El Paso will never take more gas from us at any time than it uses in these compressor stations, that the contract—or that we have representations from them that our gas physically can get to these compressor stations for use in those compressor stations, that we find ourselves in this situation of having to get this matter clarified because of the provisions in our gas supply contracts that should we ever intend to sell gas for interstate deliveries,

129

we must give due notice to our suppliers and that they, in turn, then, under the terms of their contracts with us, have the right to terminate their contracts. So that if we should enter into this scheme of things without going through this procedure, that we would have to give notice. That our producers might cancel—and I suppose some of them would—so that this gas would not be available to El Paso in any event. So we found it necessary to go through this procedure and I suppose it is on all of those things is the reason I am here, but not about the technicalities or the delivery and flow streams. I don't know anything about that, sir.

Q. Is it correct to assume that the Houston Pipe Line Company has not made any inquiry as to just how this Houston gas is to get to the various El Paso facilities in which it is to be used as fuel but is accepting El Paso's

assurance that it will get there? Houston has not made any inquiry of its own into that connection? A. I think they have furnished us this map and this flow stream, the diagram, showing—

Q. That is you are relying on the diagram, the map which is supplied to you by El Paso and the covenants and agreements in the contract? A. And also what has been said. Mr. Paul Keyser has told me, himself, that this gas physically can get to

130

every compressor station on their system, that if it takes a realignment of facilities they will be realigned and this gas can get there and I think he is a man of his word and I rely on that, sir.

. . . . . .

133

Barry Hunsaker

was called as a witness, and having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Giller:

. . . . . .

139

Q. I think that will help, Mr. Hunsaker. Now will you please explain in more detail what is shown on the map Houston Exhibit 6? A. Yes. The legend in the upper right hand corner of the map shows that the pipeline proposed to be constructed and operated by Supply Company at their Docket CP61-101 is represented by a dotted red line, or actually a red line consisting of a series of dots. The map shows that this pipeline will extend from a point

(139)

near Three Rivers in Live Oak County, Texas, to a point of connection with El Paso's existing Sonora pipeline near Sonora, in Sutton County, Texas.

This line will be utilized by Supply Company to transport between these two points the comingled stream of gas to be purchased by El Paso from Houston and Lo-Vaca. As the map shows, this pipeline is wholly within the State

140

of Texas or will be wholly within the State of Texas.

The legend also shows that El Paso's existing and proposed pipeline which will transport the Houston gas in a common stream with other gas produced in Texas from the Supply Company delivery point near Sonora to the various plants located in Texas, which will utilize the Houston gas as fuel, are shown by the solid green and solid red lines.

El Paso's existing pipeline facilities which will not transport any of the Houston gas and which are therefore not pertinent are shown in black.

Q. Mr. Hunsaker, in what county is the Phillips plant located to which gas will be delivered under the El Paso-Houston Pipe Line contract? A. That plant is located in Ector County, Texas, immediately adjacent to El Paso's Goldsmith plant.

Q. You have been here today throughout all the testimony in this case, have you not? A. Yes, sir, I have.

Q. Did you hear Mr. Ware testify about transactions between Lo-Vaca and a Phillips plant? A. Yes, sir, I did.

Q. That is in another country, is it not? A. Yes, sir, it certainly is.

Q. Mr. Hunsaker, will you please specifically point out by name and location those plants located in Texas shown

141

on Houston Exhibit No. 6 in which the gas delivered by Houston will be consumed on the system of El Paso? A.

Yes. The existing El Paso plants are: Sonora Plant in Sutton County, Pembrook Plant in Upton County, Midkiff Plant in Reagan County, Driver Plant in Midland County, Sweetie Peck Plant in Upton County, McElroy-Crane Plant in Crane County, Goldsmith Plant in Ector County, Fullerton Plant in Andrews County, Wasson Plant in Yoakum County, Plains Station in Yoakum County, Dimmitt Station in Lamb County, Keystone Field Plant in Winkler County, Keystone Mainline Station in Winkler County—

Presiding Examiner: Right down near Keystone Field?

The Witness: It is immediately to the left of Keystone Field, about a quarter of an inch, sir, where the red line originates.

Presiding Examiner: Very well.

A. (Continuing)—Station No. 1 in Culberson County, Guadalupe Station in Culberson County, Cornudas Station in Hudespeth County, Station No. 2 in Hudespeth County, Hueco Station in Hudspeth County, and El Paso Station in El Paso County.

The proposed El Paso plants are the Crockett Station to be located in Crockett County and the Upton Station to be located in Upton County.

In addition the Supply Company proposes Coquat Station

142

to be located in Live Oak County.

Q. There is no agreement that you know of between El Paso and Houston Pipe Line amending the Houston-El Paso contract to permit El Paso Supply to use Houston's gas in that Coquate Station, is there? A. No.

Q. The gas purchased from Lo-Vaca, both the gas purchased that has its end use restricted and the gas purchased that doesn't have any end use restricted, will pass through that Coquat Station, isn't that true? A. Yes, that is true.

(142)

Presiding Examiner: Let me ask one question there, if I may.

At Wasson, that is right in the Wasson Field?

The Witness: Yes.

Presiding Examiner: A desulphurization?

The Witness: Compression and dehydration.

Presiding Examiner: That is for the Wasson-Dumas loop?

The Witness: Well, actually that receives gas, residue gas from Shell who is the operator of the gasoline plant in the Wasson Field and injects it into what we call our Dumas line south of our Plains Station and the gas travels from that point north.

Presiding Examiner: And West?

The Witness: Yes.

143

Presiding Examiner: West from Plains?

The Witness: Yes.

Presiding Examiner: Thank you.

By Mr. Giller:

Q. Mr. Hunsaker, will the proposed pipelines shown extending from the McElroy-Crane, Fullerton and Wasson plants to the transmission lines be used to transport fuel gas? A. Yes. These proposed lines will be used to physically transport the Houston gas back to these three respective plants for use as fuel.

Q. Excuse me.

Are all of these plants, that is the El Paso plants and the Phillips plant to which you have just testified, located downstream from the point of delivery by Houston Pipe Line at Three Rivers, Texas? A. Yes, sir.

Q. And is there a connection between all of these plants and Three Rivers, Texas? A. Yes, sir.

Q. Through the system? A. Yes, sir.

Presiding Examiner: Isn't there some further construction necessary before it is all connected?

The Witness: We have pipelines through which this gas can be taken to each of the stations we have mentioned except

144

these three.

Presiding Examiner: You mentioned some located on the red line.

The witness: Of course the red line must be constructed first, you are right.

Mr. Giller: Yes, sir. I meant after the proposed construction to which he has testified will be made.

Presiding Examiner: Yes, sir. I was trying to get that straight. I found some of them as he read them, on the red line.

Mr. Giller: Yes, sir.

145

By Mr. Giller:

Q. I hand you here a chart, Mr. Hansaker, entitled "South Texas Project, Flow Diagram, Average Day Utilization of South Texas Gas for Plant Fuel, Drawing No. A-3-130." Are you familiar with it, sir? A. Yes, sir, I am.

Q. Was it prepared under your supervision? A. Yes, sir, it was.

Mr. Giller: May we have this marked as Houston's next exhibit?

Presiding Examiner: It is marked for identification as Exhibit 7.

(The document referred to was marked for identification as Exhibit No. 7.)

Presiding Examiner: Did you forget to offer 6?

Mr. Giller: Thank you, sir.

(145)

Before we go further into Houston Exhibit 7, I would like to offer into evidence the map, Houston Exhibit 6.

Presiding Examiner: Any objection?

Hearing none, Exhibit 6 will be received in evidence.

(The document heretofore identified as Exhibit No. 6 was received in evidence.)

By Mr. Giller:

Q. Mr. Hunsaker, would you please explain first generally, and then more in detail, what this diagram,

146

Houston Exhibit 7, shows? A. This exhibit shows the anticipated average day fuel requirements of supply companies, El Paso's and Phillips' plants located in Texas, which are to be supplied with fuel gas from the gas to be purchased from Houston.

The individual fuel requirements of each station are shown adjacent to the station symbol and generally under the name of the station.

In addition, these individual station requirements are tabulated in the lower left-hand portion of the flow diagram.

The existing and proposed pipelines through which the Houston gas will be transported are shown by the red, black and blue lines.

The direction of flow of the gas is indicated by large red arrows with the notations "Houston Pipe Line gas and Lo-Vaca Gathering Company gas," or "Houston Pipe Line Company gas," printed above the arrows.

The flow diagrm is not intended to depict the accurate geographic location of of these individual plants, but we have shown schematically on the diagram the Texas State boundary.

As a matter of fact, we have also shown the Arizona—New Mexico State boundary. It is schematically correct, but geographically it is not accurate nor to scale.

Q. What is the significance of these notations to

147

which you have just testified? Houston Pipe Line Company gas, or the Houston Pipe Line and Lo-Vaca Company gas. A. These arrows indicate the direction of flow which the Houston gas must take in order to reach the stations at which we intend to use it for fuel.

Q. What is the westernmost plant in Texas which will use Houston Pipe Line Company gas as fuel, as shown on this Houston Exhibit 7, that is, on an average day? A. Hueco Station. The fuel requirements of this station as shown on the flow diagram are 4,058,000 cubic feet per day. Of this total, we would consider that 3,015,000 cubic feet per day would be Houston Pipe Line Company gas.

Q. Now, that would be true if you would consider the consumption by Coquat Station of the supply company as being made in accordance with the contract between El Paso and Houston Pipe Line? A. Yes, sir.

Q. However, since there has been no amendment of the contract between Houston Pipe Line and El Paso Natural as of now, how much would this figure you have for Hueco be reduced? A. In that event, all of Hueco's fuel requirements will be considered as coming from Houston Pipe Line Company, and in addition there, too, it would be necessary to consider a small portion of El Paso Station's fuel

148

requirements as being requirements from Houston.

Q. Yes.

Now, look over to the right-hand edge of the Exhibit 7 as the Coquat Station. There is a small black figure which says 69.622 million cubic feet of Houston Pipe Line Company gas.

There has been some statements about 70 million cubic feet to be delivered by Houston Pipe Line to El Paso Natural. Can you explain the difference between the

(148)

70 million and the 69.622 million? A. Yes. The 70 million figure is a contract volume and it is based on the contract pressure base of 14.65.

The figure 69.622 shown on the flow diagram is that volume converted to a 14.73 pressure base.

Q. I don't know if you have testified or not, but what is the volume available for use as fuel gas at the El Paso station of El Paso Natural Gas Company? A. 5,048,000 cubic feet per day.

Q. Now, what basis did you use in determining the average day fuel requirements of the Texas plants shown on this diagram, Houston Exhibit 7? A. In the case of existing plants, we used our actual past historical experience. In the case of proposed plants, we used a design fuel rate factor which likewise is based upon experience.

149

Q. Mr. Hunsaker, does this diagram, Houston Exhibit 7, show conclusively that El Paso has average day fuel requirements at these Texas plants to which you have testified of such magnitude that the total of such average day fuel requirements exceeds the average day volume of gas to be purchased from Houston? A. Yes, sir, it does.

Q. Does it also show that by means of existing and proposed pipelines, the proposed pipelines to which you have testified, located wholly within the State of Texas, the fuel requirements of such plants can and will be supplied from a common stream containing only Houston gas and other gas produced in the State of Texas? A. Yes, sir.

Q. Will any gas produced outside the State of Texas be transported in any of the pipelines shown transporting the Houston gas? A. No, sir.

Mr. Giller: I would like to offer into evidence as Houston Exhibit No. 7, if I have not already done so, this map.

Presiding Examiner: Any objection?

It will be received as Exhibit 7.

(The document heretofore identified as Exhibit No. 7 was received in evidence.)

150

By Mr. Giller:

Q. Mr. Hunsaker, I show you here a diagram bearing the legend in the title block in the lower right-hand corner, "South Texas Project, Flow Diagram-Maximum Day Utilization of South Texas Gas for Plant Fuel, Drawing No. A-3-131." Are you familiar with this, sir? A. Yes, sir, I am.

Q. Was it prepared under your supervision? A. It was.

Mr. Giller: May we have this marked as Houston's next exhibit for identification, please?

Presiding Examiner: It may be marked as Exhibit 8 for identification.

(The document above described was marked Exhibit No. 8 for identification.)

By Mr. Giller:

Q. Mr. Hunsaker, would you please explain this exhibit, Houston Exhibit 8? A. Well, the format of this exhibit is essentially the same as that of the average day exhibit, Exhibit No. 7, which we just discussed. However, this particular exhibit shows the peak day fuel requirements of the Texas plants which will utilize the Houston gas as fuel, and it also shows the maximum daily contract volume being purchased from Houston.

151

Q. At which station will the aggregate fuel consumption equal the volume purchased from Houston Pipe Line on this maximum day flow diagram, Houston Exhibit No. 8? A. The last station on the bottom pipeline which will use

(151)

Houston gas as fuel is McElroy Crane. The last station on the pipeline at the top of the page which will use Houston gas as fuel is Dimmitt Station.

Q. Is that true whether or not you consider the use by Coquat to be the use of Houston Pipe Line-delivered gas? A. If we were to consider that Coquat or the supply company did not use Houston gas as fuel, et cetera, then Dimmitt—then we would consider that all of the Dimmitt's fuel would be Houston gas, and in addition it would be necessary to reach down to one more station going west from McElroy Crane.

Q. Then is it true that the fuel requirements of the Texas plants located to the west of Keystone M.L. would be considered as excess capacity over the volume actually purchased from Houston Pipe Line? A. Yes, that is correct.

Q. And about what is this excess fuel in those other plants? A. It is 31.879 million cubic feet per day.

Q. That is including if any gas should be used at Coquat, is that right?

152

A. Let me check that figure just a moment.

Yes.

Q. Excuse me. I did not hear your answer. Were you saying that this 31.879 million cubic feet assumed that Coquat might be using gas purchased from Houston Pipe Line? A. Yes, it does.

If you delete the use of Houston gas by the supply company, then the surplus becomes 29,916,000 cubic feet per day.

Q. So there is still over 29 million cubic feet per day excess at the peak flow in El Paso's line, is that correct? A. Yes, sir.

Q. What basis did you use in determining the maximum day fuel requirements of the Texas plants shown on this

diagram, Houston Exhibit No. 8, Mr. Hunsaker? A. We used design fuel rate factors.

Q. Does this flow diagram, Houston Exhibit No. 8, show conclusively that El Paso's and Phillips' maximum day fuel requirements at these Texas plants are of such magnitude that the total of such maximum day fuel requirements exceeds the maximum day volume of gas to be purchased from Houston Pipe Line Company?

Ormasa: Just a moment. I object to the use of the term "conclusively," if Your Honor please. I think that is

153

expressing too much of an opinion in the matter. I have no objection to the question if he strikes that one word.

Mr. Giller: If he wants to cross-examine the man on this subject, I think that is his right, but I would like to have my question answered if I may.

Presiding Examiner: Well, I think some of the quantities speak for themselves on the exhibits and the premise is the same as was involved in North Dakota v. Federal Power Commission, and in Oklahoma Natural, that there would be volumes in excess of the quantities involved in the contracts in both of those cases.

So I don't think it is necessary to drive it home by the oral testimony.

Mr. Giller: In that event, I will withdraw the use of the term "conclusive," which I think was the objection made by the gentleman. And may I restate my question, then?

Presiding Examiner: All right.

By Mr. Giller:

Q. Mr. Hunsaker, does the flow diagram, Houston Exhibit No. 8, show that El Paso's and Phillips' maximum day fuel requirements at these Texas plants are of such magnitude that the total of such maximum day fuel re-

(153)

quirements exceeds the maximum day volume of gas to be purchased from Houston Pipe Line Company? A. Yes, sir.

• • • • • • • • • •

157

By Mr. Giller:

Q. Mr. Hunsaker, let me refer you again to Houston Exhibit No. 8 and the last question. What are the maximum day volumes of gas that you have referred to? What is the volume in Mcf? A. Those purchased from Houston?

Q. Yes. A. Seventy million cubic feet of gas per day at a pressure base of 14.65. That volume converted to a pressure base of 14.73 is equivalent to 76,584,000 cubic feet per day, and that is the volume shown in the lower right-hand corner of Exhibit 8.

Q. Thank you.

Does this exhibit, Houston Exhibit No. 8, also show that by means of existing and proposed pipelines located wholly within the State of Texas, the fuel requirements of such plants will be supplied from a common stream containing Houston gas and other gas produced in the State of Texas only? A. Yes, sir.

Q. What is the relation between El Paso Gas Supply

158

Company and El Paso Natural Gas Company? A. The Supply Company is a wholly owned subsidiary of El Paso Natural.

Q. These exhibits, Houston Exhibit 7 and Houston Exhibit 8, have referred to conditions on the average day and on the maximum day.

At all times will the volume of gas received from Houston, that is, Houston Pipe Line Company, be consumed in Texas at points downstream and connected with the point of delivery by Houston Pipe Line to El Paso? A. Yes, sir.

Q. Will any gas produced outside the State of Texas be transported in any pipelines shown transporting the Houston Pipe Line gas on this Houston Exhibit No. 8? A. No, sir.

Mr. Giller: We would like to introduce Houston Exhibit No. 8, Mr. Examiner. We offer that into evidence.

Presiding Examiner: Any objection?

Mr. Knight: No objection.

Presiding Examiner: Exhibit No. 8 will be received.

(The document heretofore identified as Exhibit No. 8 was received in evidence.)

By Mr. Giller:

Q. Mr. Hunsaker, I hand you here a drawing entitled "South Texas Project, Flow Diagram Showing Southern System

Design Capacity, Drawing No. A-3-127." Are you familiar with this drawing, No. A-3-127, Mr. Hunsaker? A. Yes.

Q. Was it prepared under your supervision? A. Yes.

Mr. Giller: May we have this marked for identification?

Presiding Examiner: It will be marked for identification as Exhibit No. 9.

(The document above described was marked for identification as Exhibit No. 9.)

By Mr. Giller:

Q. Mr. Hunsaker, I also hand you a diagram entitled "South Texas Project, Flow Diagram Showing Permian Field Design Capacity, Drawing No. A-3-129." Are you familiar with that drawing, Mr. Hunsaker? A. Yes, sir, I am.

Q. Was it prepared under your supervision? A. It was.

(159)

Mr. Giller: May we have this marked for identification as Houston's next exhibit, please?

Presiding Examiner: The flow diagram so described will be marked for identification as Exhibit No. 10.

(The document above described was marked for identification as Exhibit No. 10.)

By Mr. Giller:

160

Q. Mr. Hunsaker, would you please explain what these Houston Exhibits 9 and 10 show? A. These exhibits were prepared for El Paso's application at Docket CP61-26 and are presented here for the purpose of showing that after acquisition of and completion of facilities for the South Texas Project, the gas to be purchased from Houston and La-Vaca at maximum design conditions will be commingled only with Texas-produced gas, and that its flow will be continuous and down stream at all times from its source to its points of ultimate consumption within the State of Texas.

Exhibits 7 and 8 are easier to understand since they are less complicated, but they do not show all of El Paso's Permian Basin and Texas mainline pipelines.

Q. Mr. Hunsaker, you have testified these flow diagrams, Houston Exhibits 9 and 10, show conditions under maximum design operations. Would your statement concerning the continuous and downstream flow of the Houston gas and its commingling only with Texas-produced gas also be true on all other days? A. Yes, sir.

Q. Now, referring to Houston Exhibits Nos. 9 and 10, how much of the system, the existing system of El Paso in the area which these cover do these show? A. Exhibit 10 shows all of the major pipeline facilities

161

in the Permian Basin area. It does not show gathering systems.

Exhibit 9 shows all of the mainline pipelines in what we call our Southern System, perhaps with the exception of some very small lateral lines to sales points. All major lines are shown.

Q. That is true as of today, is it? A. Yes, sir.

Q. Would you please take a look at these Houston Exhibits 9 and 10 and explain the different colored lines on there, sir? A. Yes. Beginning with Exhibit 9, all of our existing pipeline facilities are shown in black. Those pipeline facilities pending, and in this case they are pending at Docket G-18616, are shown in blue.

On Exhibit 10, we have shown all of our existing pipeline facilities in black. Those pipeline facilities proposed at Docket G-15696 are shown in green. Those pipeline facilities proposed at Docket G-18616 are shown in blue. And those pipeline facilities proposed at Docket CP61-26 are shown in red.

Q. Are the directions of flow of gas shown on these Houston Exhibits 9 and 10? A. Yes, sir.

Q. And how is that indicated, Mr. Hunsaker? A. It is indicated by arrows with volumes of gas printed adjacent to those arrows.

162

Q. As I understand your previous testimony, even with all these lines of El Paso in this area, still there will be no gas produced outside the State of Texas that will be commingled with the gas purchased from Houston Pipe Line Company ahead of the consumption of that volume of gas purchased from Houston Pipe Line Company. Is that correct? A. That is correct.

. . . . . .

168

John H. Wimberly

Further Cross-Examination

By Mr. Laster:

. . . . . .

Q. I believe that you mentioned yesterday that the line southwest of the point labeled George West on this map, and I am assuming here that George West is the point of intersection of those three pipelines which seem to converge at that point.

We understand that the line southwest is called the initial source of delivery. Tell me just what did you mean by "initial source of delivery"? A. I meant by that that if and when deliveries start under this proposed contract that we can furnish, initially, all of the gas that is needed under that contract from our

169

sources of supply along the line you just described.

Q. In other words, this line represents your capabilities with regard to the initial quantity which is to be delivered under this contract? A. I don't believe that is altogether accurate. It doesn't represent our capabilities because we have more capability than that. I simply have said that initially we can supply all of the needs from our sources of supply along that line.

As a matter of fact, our entire system rests behind this contract, all of our capabilities.

Q. I see.

In other words, you are not relying upon some sort of a reservation that this particular line represents the gas which is reserved for El Paso under these contracts? A. We are not.

. . . . . .

172

By Mr. Laster:

Q. We would appreciate knowing that if Houston is going

173

to rely upon its system capacity here and take gas from other areas than what is labeled here as initial source of delivery, we would like to know just where those other areas are located on this map? A. All right, sir. I said that initially we can, and I suppose will, initially, furnish all of the needs under this contract from our gas supply along the line extending in a southwesterly direction from George West, which we have described, initially.

Our contract says that our entire system, all of the supply, stands back of this contract. I can't say and I don't know that anybody can say right now from which field or where this gas is all going to come from. The entire system is back of it. This system is located entirely within the state. We buy gas only from producers in the field. All of the gas to be delivered, however, it may be delivered through this system of lines to Three Rivers, will be gas that is produced in the State of Texas. Only initially will we begin deliveries from this particular point.

Now, I don't know, time may have something to do with that. By the time these deliveries begin it may be necessary to feed some more gas into that point, I don't know.

• • • • • • • • • • •

178

By Mr. Laster:

Q. My question was simply whether or not all of your producer contracts, Mr. Wimberly, have a clause such as Exhibit 4? Exhibit 4, just to recall to your mind, is the

179

provision of your Argo contract which is entitled "Sales by Buyer in Interstate Commerce." A. Yes, I have it.

All of our gas supply contracts along this particular line have either this or a similar provision in them.

I know, without having ever seen all of our gas supply contracts which do not have this provision in them. I know, too, from my own knowledge that in the last several years that we have not entered into any gas supply contracts that do not have this provision in them.

I know from just general knowledge in my job that some years ago, back in the 1940's, I suppose, let's say maybe prior to the Phillips decision—I am not sure, I am not entirely familiar with those matters—that there may be some contracts which we have which are of long standing which do not have this particular provision in them. I know, further, from my own knowledge, that a large percentage—and I am not prepared to say how much—of the reserves that we have available to us, simply because they are the more recent contracts, do have this provision in them.

But I know, too, that 100 percent of our gas supply contracts do not have this requirement in them.

Q. Well, can you testify with regard to this which do not have this provision that gas from these wells will never reach El Paso under this arrangement?

180

A. No, I could not testify to that. Our whole system is back of it.

• • • • • • • • • •

185

By Mr. Ormasa:

Q. I wonder if your counsel could furnish you with copies of Exhibit No. 7 and Exhibit No. 8? A. I have them, sir.

Q. Now, I would like you to turn your attention to Exhibit No. 7 first, if you would please, sir.

You were here, were you not, when Mr. Hunsaker testified yesterday concerning this particular exhibit?

. . . . . .

186

A. I believe I was in the room most of the time. I was out of the room sometime while he was giving his testimony, Mr. Ormasa.

Q. Are you familiar with the fact that this exhibit sets forth various compressor stations? A. Yes, sir.

Q. And some of those compressor stations are located in the State of Arizona; is that correct, sir? A. Yes, sir.

Q. Some of them are located in the State of New Mexico, is that correct, sir? A. Yes, sir.

Q. And some of those are located in the State of Texas; is that correct, sir? A. Yes, sir.

Q. To your knowledge, is it not a fact that the gas pipeline system of Houston Pipe will connect at Three Rivers with a pipeline system which ultimately reaches those compressor stations in the State of Arizona and the State of New Mexico? A. Yes, sir. That is all recognized in the contract, everything we have been over, that our gas will go in a commingled stream, part of which will leave the state.

Q. That is set forth in Article XVI of your contract, Exhibit B-1, in this proceeding; is that correct, sir?

187

Mr. Giller: Again, Mr. Examiner, I must object to any interpretation of the contract by this witness, and I believe that is what that question asks.

Mr. Ormasa: I didn't ask him to interpret anything. I merely asked him if what he said was set forth in Article XVI of the contract.

Presiding Examiner: I don't believe that that is a question to explore orally. I think the contract speaks for itself. The witness has frankly stated both on direct and cross-examination the fact that they understand that the gas will be commingled, and it is a contractual rather than a physical separation.

Mr. Ormasa: I think the point is well made, Mr. Examiner. There is no point in belaboring it further.

• • • • • • • • • • •

193

By Mr. Ormasa:

Q. Turning your attention again to Exhibits Nos. 7 and 8, Mr. Wimberly, setting forth the schematics of the compressor stations, is it not true that physically the so-called Houston Pipe Line gas can go anywhere on that system where we have the designation of Lo-Vaca Gathering Company gas?

Mr. Ross: May I have the question read back, please?

Presiding Examiner: You may.

(Question read)

194

The Witness: I assume that is so, but Mr. Hunsaker could better answer that than I.

By Mr. Ormasa:

Q. Mr. Wimberly, you have quite a bit of experience in the pipeline business, is that correct, sir? A. Yes, sir, I have been in it for some time.

Q. You are familiar with the fact that this commingled gas starts at Three Rivers? A. Yes, sir, it starts there.

Q. Can you give me any reason that you can think of why the Lo-Vaca gas could reach a point that could not be reached by the commingled Houston Pipe Line gas? A. No, sir, I cannot. I suspect some of it will end up on the West Coast.

As we have said before, this is a contractual rather than a physical separation, and the contract recognizes that, we all recognize it.

Q. Always glad to see gas on the West Coast, Mr. Wimberly.

Then, if I understand you correctly, you are saying that although your contract provides for consumption of the Houston gas within the State of Texas, that physically this is not necessarily true? A. I think that is correct, yes, sir.

. . . . . .

199

Mr. Ormasa: I think the question I asked last, Mr. Examiner, was that assuming that the gas was physically delivered at Three Rivers, would it make any difference whether or not the contract contained the prohibition.

200

Presiding Examiner: Can you answer the question now that we have tried to clarify it here as to just which contracts are involved?

The Witness: Assuming that our gas is delivered, would it make any difference as to whether this prohibition is in our contract, any difference in what?

By Mr. Ormasa:

Q. In the physical delivery of gas along the pipeline system. A. Whose pipeline system?

Q. El Paso's.

(200)

We will get there yet. A. I suppose not.

Q. Is it your position, Mr. Wimberly, that there is any physical result from these contract prohibitions or that the result is any different than a bookkeeping entry as to an allocation as to sources of gas and distribution of that gas? A. You will have to repeat that question. I am sorry but you lost me.

(Question read)

The Witness: I don't know about a bookkeeping entry. I repeat the only way I know how to answer it is that we realize the contract has provisions in it to the effect that our gas enters into a commingled stream, that this

201

separation as to the use of this gas by El Paso is a contractual one and not physical—and not physical.

* * * * * * * * * * *

Redirect Examination

By Mr. Giller:

Q. Mr. Wimberly, I hand you a copy of Houston Exhibit No. 2, the contract between Houston Pipe Line Company and El Paso Natural Gas Company.

Do you expect El Paso Natural Gas Company to live up to their contract? A. Yes, sir, I certainly do.

Mr. Giller: No further questions.

Mr. Knight: I have one question, if I may, Mr. Examiner.

Presiding Examiner: All right, Mr. Knight.

Mr. Knight: This is along the line that Mr. Wimberly has been testifying very forthrightly and I think we can sum it up in one or two questions. That is, Mr. Wimberly's position as president of the Houston Pipe Line Company is that he is under no illusion and makes no pretense that physically the gas which Houston will sell to and deliver

to the El Paso Natural Gas Company, will not go into various states, not

202

only Texas but also New Mexico, Arizona and even California, along with the other gas in that commingled stream.

Recross-Examination

By Mr. Knight:

Q. Isn't that your position? A. Yes, sir.

I contend only that the gas that we deliver to El Paso is produced wholly within the State of Texas and enters into a commingled stream, some of which leaves the state, yes, sir.

203

By Mr. Knight:

Q. And Houston gas just goes along with that commingled stream wherever that commingled stream goes? A. Yes, sir

• • • • • • • • • • •

204

Jack Ware

• • • • • • • • • • •

was recalled as a witness, and having been previously sworn, was examined and testified further as follows:

• • • • • • • • • • •

Further Redirect Examination

By Mr. Ross:

• • • • • • • • • • •

216

By Mr. Ross:

Q. Is it not a fact that under each of the contracts, the May contract and the March contract, gas reserves are to

(216)

be specifically dedicated separately to each contract? A. According to the contract, yes, sir.

217

. . . . . .

Further Cross-Examination

By Mr. Laster:

. . . . . .

256

By Mr. Ormasa:

Q. Were they practically simultaneous negotiations? A. No, sir.

Q. One of which ended sooner than the other? A. They were not simultaneous, they were overlapping. Prior to the actual execution of the March contract, we had commenced negotiations on the May contract.

257

Q. I wonder if you could help me on this, Mr. Ware.

You said that the deliveries of gas under the two contracts, two basic contracts, will be separately metered. Just how does that work? A. The only way I can answer that question is to call your attention to the provisions in the contract, that the gas purchased under each contract calls for a meter and meter run to be installed by El Paso with the allowance on the part of Lo-Vaca to install a check meter. That is a contractual requirement.

As to the mechanical end of it, I am, again, going to tell you I am not an engineer. I don't know how they are going to go about that.

. . . . . .

265

[Barry Hunsaker]

Cross-Examination

* * * * * * * * * *

By Mr. Knight:

Q. Mr. Hunsaker, do you have before you Houston's

266

Exhibits 6, 7, 8, 9 and 10? A. Yes, sir, I believe I have all of those with me here.

Q. Inviting your attention to Exhibit 10 and to Exhibit 6, Exhibit 6 shows near the lower right-hand corner the Coquat compressor station which El Paso Gas Supply Company proposes to construct. That is correct, is it not? A. Yes, sir.

Q. Now, it is my understanding that that is the point at which the gas which is involved in this proceeding, that is, Houston's gas and Lo-Vaca's gas, will be received into the pipeline of the El Paso Gas Supply Company. Is that not correct? A. That is the approximate point.

Q. Yes. A. Yes, sir.

Q. The gas from all of those sources involved in this proceeding will move through the Coquat compressor station, is that correct? A. Yes, sir.

Q. Will Houston's gas be separately metered, aside from Lo-Vaca's gas, before going into the Coquat station? A. Yes, sir.

Q. And will the gas which is sold under Lo-Vaca's March 1960 contract be separately metered from the Lo-Vaca

267

gas which is sold under the May 1960 contract before going into the Coquat station? A. I suppose it will be if required. We haven't formulated any definite plans with respect to that metering.

Q. That is, that is something that still remains to be

determined? A. Yes. We will do whatever is required.

Q. But if the gas under those two contracts is not separately metered, at least Lo-Vaca's gas will be separately metered from Houston's gas before going into the Coquat station? A. Yes, sir.

Q. I believe that the contracts provide that El Paso Gas Supply Company will construct and own and operate those metering devices, but that is something I can check in the contract, or do you recall offhand? A. That is the case in the contracts with Lo-Vaca, that is not the case in the contract with Houston. Houston will install their own meters.

Q. Houston will install its own? A. Yes, sir. I believe I have that correct. Yes, I have.

Q. That is set out in the contract and I can refresh my recollection by that means.

Will gas from any source other than Houston and Lo-Vaca

move into and through the Coquat station? A. There are no plans at this time to move any gas other than the Lo-Vaca and Houston gas through that station.

Q. But so far as you know, there is no contractual or physical impediment to prevent gas from other sources moving through that station in the future? I am asking that in the form of a question. A. Not that I know of.

Q. Then from the Coquat station the gas will emerge into the pipeline which is proposed to be constructed by the El Paso Gas Supply Company; is that correct? A. Yes, sir.

Q. And of course it is just a matter of reasoning that that gas from those two sources, Lo-Vaca and Houston, will be fully commingled at that point when it gets into that pipeline? A. Yes.

Q. Yes.

So the gas goes on up to Sonora.

Now, the Coquat station will be fueled by gas, will it not? A. Yes, sir, it will.

Q. Which will of course be gas from both Houston and Lo-Vaca. That is correct, is it not? A. That is correct.

269

Q. Now, at the point of delivery which I understand from the contract, takes place just before the gas gets into the Coquat station, at that point El Paso Naural Gas Company takes title to the gas under the contracts, I believe. Is that your recollection? A. I believe we do, Mr. Knight.

. . . . . .

271

Q. Now, we come to Sonora and I believe that is the first of El Paso Natural's facilities which is shown in the list on Exhibit 7 as being fueled by the Houston Gas. That is that list there.

Now, I am stating a lot of these things which I will ask you to confirm, rather than just asking the question, you just confirm them.

That is a correct statement, the first of the stations listed? A. Yes, that is correct.

Q. We move on through Sonora and looking at Exhibit 10, we pick up some gas from the Vinegarone Field into El Paso's mainline, do we not? A. Yes, sir, we do.

Q. Which, of course, is commingled with the gas already in there, that is with the gas that was obtained from Houston and Lo-Vaca?

272

A. That is correct.

Q. And as this gas moves along El Paso Natural Gas Company's mainline on up to the Emperor Field in Keystone, it picks up gas from numerous additional sources in the Perminan Basin? A. Yes, sir.

Q. All of which gets into El Paso's main pipeline and is mixed up, commingled. A. That is correct.

• • • • • • • • • • • •

282

By Mr. Knight:

Q. Now, Mr. Hunsaker, continuing westward on Exhibit 6, on that journey westward, El Paso's main line through the Permian Basin receives gas from numerous sources, all of which of course is commingled with gas already there in the pipeline. I believe we agree on that, do we not? A. Yes.

Q. And also on that journey westward up the main line, El Paso's main line, that is, some of this commingled gas is used as fuel in various El Paso facilities, that is, compressor plants and gasoline plants and dehydration plants and so forth. That is correct, is it not. A. Yes.

• • • • • • • • • • • •

284

By Mr. Knight:

Q. Now, continuing westward, Mr. Hunsaker, through the Emperor Field in the Permian Basin, we go over into

285

Lea County, New Mexico, do we not? A. Some of the pipelines do, yes, sir.

Q. Does El Paso have any pipeline that runs up through Sonora, Crockett, Upton, Crane, Ector and Loving Counties, Texas, that do not go over into this Lea County, New Mexico? A. Existing pipeline?

Q. Existing pipeline. A. Speaking in terms of gas flow, no.

Q. That is, all the gas flowing along through the Permian Basin system, El Paso's Permian Basin system now, along

this route shown on Exhibit 6, through existing lines, flows over into Lea County, New Mexico, is that correct? A. No, sir, it is not.

Q. What correction should be made in that statement? A. Some of the gas flows north to the Dumas line and then to—

Q. Where does that leave the line that runs up by Wilshire, Waddell and through the Emperor Field? Where does that Dumas gas leave there? A. It leaves at Goldsmith.

Q. Now, which is your main route here? A. Up through Sweetie Peck to Goldsmith, or by way of Wilshire, Waddell and up through what is called K. Emperor there?

A. They are both major arteries, Mr. Knight. I believe the Upton County line which is the lower line, carries a greater volume of gas at the present time.

Q. Yes. That would be the one that flows by the Wilshire and Waddell plants. A. Yes, that is right.

Q. Of course from those Wilshire and Waddell plants gas flows from those plants into El Paso's main line then, doesn't it? A. That is correct.

Q. And of course you have a junction here where a line—near where the Upton compressor station is going to be constructed shown by a red dot there in Upton County. That is where some of the gas leaves one of the lines and goes up towards Goldsmith, isn't it? A. Yes, sir.

Q. Now leaving for the time being this gas that goes up by Goldsmith, and that is the Phillips Goldsmith plant that we are talking about, isn't it? A. Well, and also our plant.

Q. Yes.

Presiding Examiner: I have lost you on Goldsmith. Where is that?

I see it. Excuse me.

287

By Mr. Knight:

Q. Leaving that out of our discussion for the time being and looking at this lower line down here, that gas gets into this five-track system of lines that run over into Lea County, New Mexico, doesn't it? A. Yes, sir, it does.

Q. And it—

Presiding Examiner: Would it help things at this point to say that so far all we are talking about is the Southern system?

The Witness: So far we are just talking about the Permian system, Mr. Examiner. The Southern system begins at about the point that he is at now and proceeds west.

Mr. Knight: Yes.

By Mr. Knight:

Q. I believe also your Phillips Goldsmith plant would be included in the part of the line we have been talking about, wouldn't it? A. Yes, sir.

Q. That is they are not separate systems? A. No.

Q. So we come down to Jal No. 1, that is a compressor station, isn't it? A. It is everything.

Q. That is you have a lot of facilities there?

288

A. Yes, sir, all types of facilities.

Q. That includes a gasoline plant, too, doesn't it? A. Yes, sir.

Q. Is that in New Mexico or Texas? A. New Mexico.

Q. Yes.

Does more gas flow into the line at that point into El Paso's system? A. Yes, sir.

Q. That gas comes down from your sources up here in Lea County, New Mexico, doesn't it? A. Primarily.

Q. Yes.

Then continuing westward along this five-track system here, we come over to the Eddy County, New Mexico, where we find the Pecos River facilities. A. Sure do.

Q. You have a compression station there? A. Yes, sir.

Q. And a gasoline plant too? A. No, sir.

Q. Dehydration? A. No, sir.

Q. Anything besides compression? A. Just compressor station.

289

Q. But some more gas flows into the line at that point, doesn't it? A. Immediately upstream of it.

Q. Yes. When you say "upstream," that is to the right? A. Yes, sir, on Exhibit 6 it would be to the right.

Q. On Exhibit 6, yes, sir.

Then all that commingled gas comes on back down into Texas, into Culberson County and continues in a generally westward or southwestward direction through Hudspeth and continues on westward in El Paso's system? A. That is correct.

Q. And all along the route there gas is being used in El Paso's facilities? When I say "El Paso," I mean El Paso Natural Gas Company as distinguished from El Paso Gas Supply Company. A. Yes.

* * * * * * * * * *

306

By Mr. Knight:

Q. Can you keep Lo-Vaca gas from getting into some

307

of El Paso's facilities in Texas, Mr. Hunsaker? A. No, sir.

Q. Now, coming back to my previous question, which I will rephrase and perhaps make it more simple: there will be in Texas some El Paso facilities with regard to which no representation is made that any Houston or Lo-Vaca

gas will be as a fuel? A. That question presents a problem to me, Mr. Knight.

Q. How about Dumas? Are you going to use any of that Houston or Lo-Vaca gas in Dumas? A. We are not proposing at present to use it in Dumas, but we do propose to use that 70 million in Texas wherever we can and have to use it.

I think we have indicated a number of plants here which can take up 70 million cubic feet per day, and we have shown that, perhaps for illustration.

I don't know that El Paso is in the position of wanting to be specifically tied right here to these plants.

Q. Mr. Hunsaker, as a practical proposition, isn't this what it boils down to: El Paso is going to buy gas from Houston and Lo-Vaca, that gas is going to be commingled with gas that El Paso buys from other producers as it flows along through the Permian—El Paso's Permian system, and from that commingled stream, El Paso is going

308

to get fuel for its facilities; isn't that right? A. Yes.

Q. And some of that commingled stream is going to flow right on out of Texas through New Mexico over to Arizona and right on down to Los Angeles, isn't it? A. A portion of it will.

. . . . . .

314

Cross Examination

By Mr. Ormasa:

. . . . . .

340

Q. Now isn't it also true that another source of gas ultimately flowing into Guadalupe starts at Keystone—I refer to Exhibit 7—starts at Keystone and proceeds to

Pecos River, and then from Pecos River into Guadalups? A. Yes, that is correct.

Q. Now that direction of flow would be just as true after the building of the 186169 as before; is that correct? A. Yes, that is correct.

Q. So physically, Houston, Lo-Vaca, and other gas you pick up in Texas would go through that line I just referred to? A. A portion of the commingled stream will do that.

Q. Now turning your attention to volumes for a moment, starting at Guadalupe, does that figure of 5,130,000 cubic feet per day, does that represent the total fuel used at the Guadalupe station? A. Yes, sir.

Q. How is that broken down between the two separate compressor stations? A. We have not broken it down, Mr. Ormasa. The service on the 16-inch OD line would use a small percentage of the total.

* * * * * * * * * * *

342

Q. Now at or near El Paso station, will that 16-inch line then physically connect with the lines coming down from Pecos River? A. Yes, sir, it will connect with those lines on the discharge side of El Paso station.

Q. And would it at that point have roughly 90 million cubic feet per day, or in that area? A. Yes, sir.

Q. And that gas—when these two or more lines connect on the discharge side of the El Paso station would it not be a fact that part of the gas coming through the 16-inch line and connecting there will contain physically some of the Houston-Lo-Vaca gas?

343

The Witness: May I have the question read?

Presiding Examiner: Yes.

(Question read)

The Witness: That is difficult to answer yes or no. We will, of course, utilize an amount of fuel in excess of the amount we purchase from Houston and that will be metered individually into each station and it will be taken from commingled stream. To the extent we have a commingled stream we will still have the same commingled stream downstream of El Paso station.

• • • • • • • • • • •

344

By Mr. Ormasa:

• • • • • • • • • • •

Q. And can you tell me this as to the general way, as to what percentage of the total Texas source gas you obtain that this Houston, Lo-Vaca gas represents? Rough figures. I don't want any accurate figures. A. Referring to an average day situation?

345

Q. Yes. A. If you will permit me to be rough—

Q. Yes, I will, certainly. A. I would imagine that we purchase or produce something in excess of 2.5 billion cubic feet of gas a day in Texas. The Lo-Vaca Houston total will be 170 million. Houston's portion is 70 million. You can make your own division and determine the appropriate percentage.

Q. Thank you.

Now, can you tell me, turning your attention to the Lee County gas in New Mexico, approximately what volumes do you pick up in your line there and deliver on into Texas? A. Pick up where?

Q. Do you pick up gas in Lee County, New Mexico? A. Yes, we do.

Q. Perhaps you can tell me where those stations are that you receive the gas at. A. I am trying to determine

which exhibit to refer you to so that we can see it as we discuss it, Mr. Ormasa.

I believe Exhibit 10 would be the easiest one to follow. In the center of this exhibit you will notice several plants labeled "JAL4, JAL2, JAL3, JAL1", etcetera.

We receive gas from all of these plants of pipeline quality.

At Eunice main line station and Keystone main line

346

station, and JAL1 main line station, in varying proportions and quantities of flow with respect to each.

Q. Part of this gas then from the fields in New Mexico goes directly to the Keystone station? A. Yes, sir, Keystone main line.

Q. And that is what is designated on the various exhibits as Keystone ML, is that correct, sir? A. That is correct.

Q. Can you tell me roughly what volume of gas is obtained from Lee County and is transmitted to Keystone main line station?

• • • • • • • • • • •

347

The Witness: Well, I think it could vary from nothing to 400 million a day or thereabouts. The average day may be 180 to 200 million cubic feet per day but it does vary tremendously.

• • • • • • • • • • •

348

Q. And the flow of gas is generally southward into the Keystone main line? A. Yes.

Q. Does that gas become part of the general gas supply there at the Keystone main line compressor station? A. Yes, it does.

Q. Part of it then from there flows back into New Mexico, is that correct, sir? A. That is—

Q. As part of the commingled gas? A. Well, I would say that all of it flows back into New Mexico.

Q. Is any of it used there at Keystone? A. Keystone requires fuel which may come from that particular line, or the Upton County Line. It may not know the difference because it may be common at this point.

Q. You mentioned that a certain amount of gas also went to the Eunice station? A. Yes, that is correct.

I wonder if I might go back to the last answer and clarify that? I don't want anyone to misunderstand.

When this project goes into operation, the piping

situation at Keystone main line will be arranged so that the supply for the 16-inch O.D. line will come exclusively from sources in Texas. There will be no possible way for Lee County gas to get into that 16-inch O.D. line.

Presiding Examiner: Let me ask one question: Is there any flow of gas south from Northern Natural through Dimmitt, or is that all a north flow? A. That is all north flow, from Plains north. There is never a flow from Plains south. There is or has been and will be a flow from the junction below Plains south.

That is the junction Mr. Ormasa referred to earlier this morning.

By Mr. Ormasa:

Q. I think the pending question, Mr. Hunsaker, refers to volumes that you receive at Eunice from the Lee County fuel. A. Yes, we do receive volumes in varying quantities at Eunice from Lee County.

Q. And that volume then proceeds southerly into Pecos River and then south into Guadelupas station intact? A. That is correct.

Q. Does any of it flow from Eunice northward? A.It won't under this project.

• • • • • • • • • • •

357

Q. You have in Exhibits 7 and 8 made certain assumptions to determine where the gas might be used based on your assumptions. Based on the same assumptions, have you determined what the situation would be on a minimum day as

358

distinguished from the average day shown in Exhibit 7 and maximum day shown in Exhibit 8?

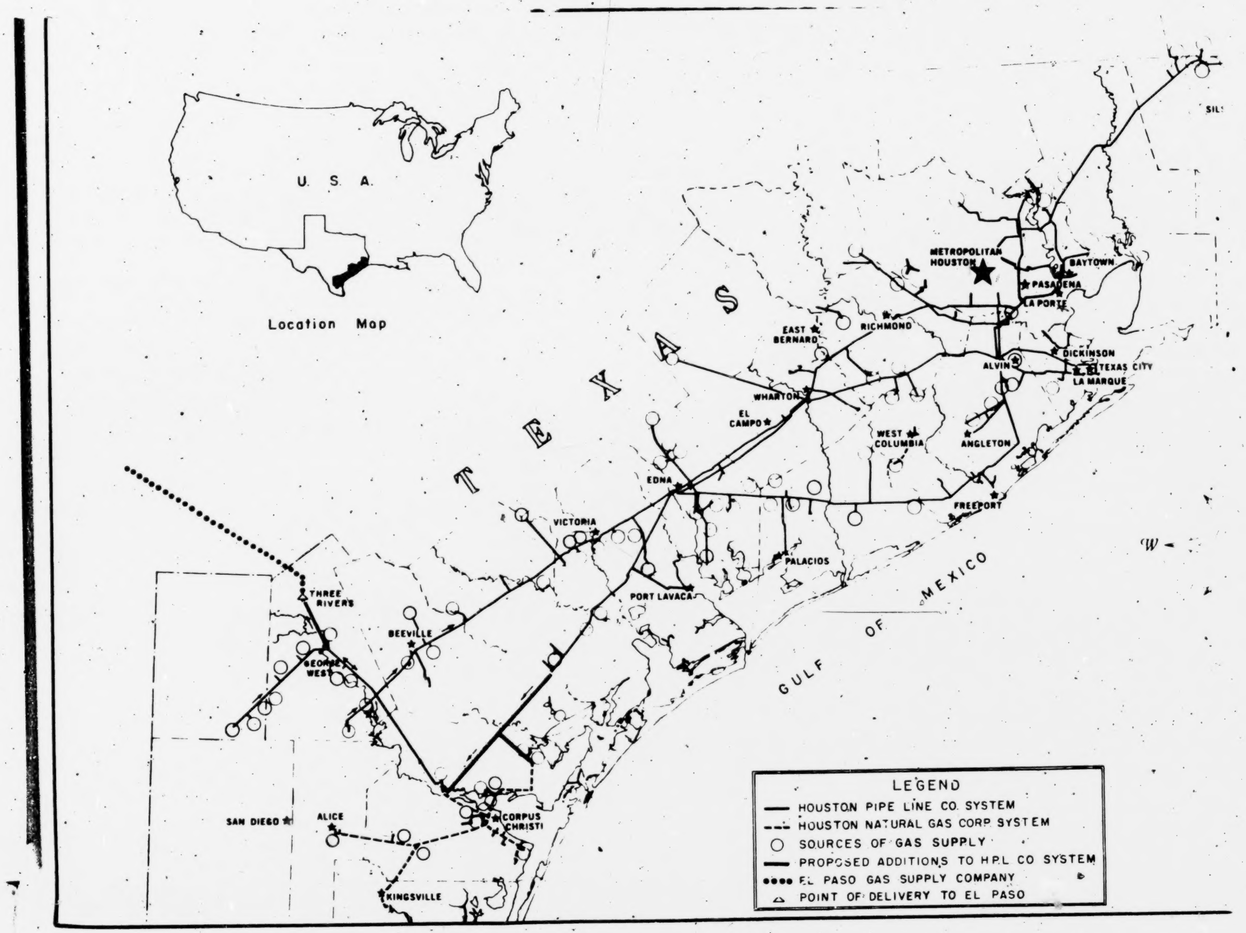
The Witness: May I have the question re-read?

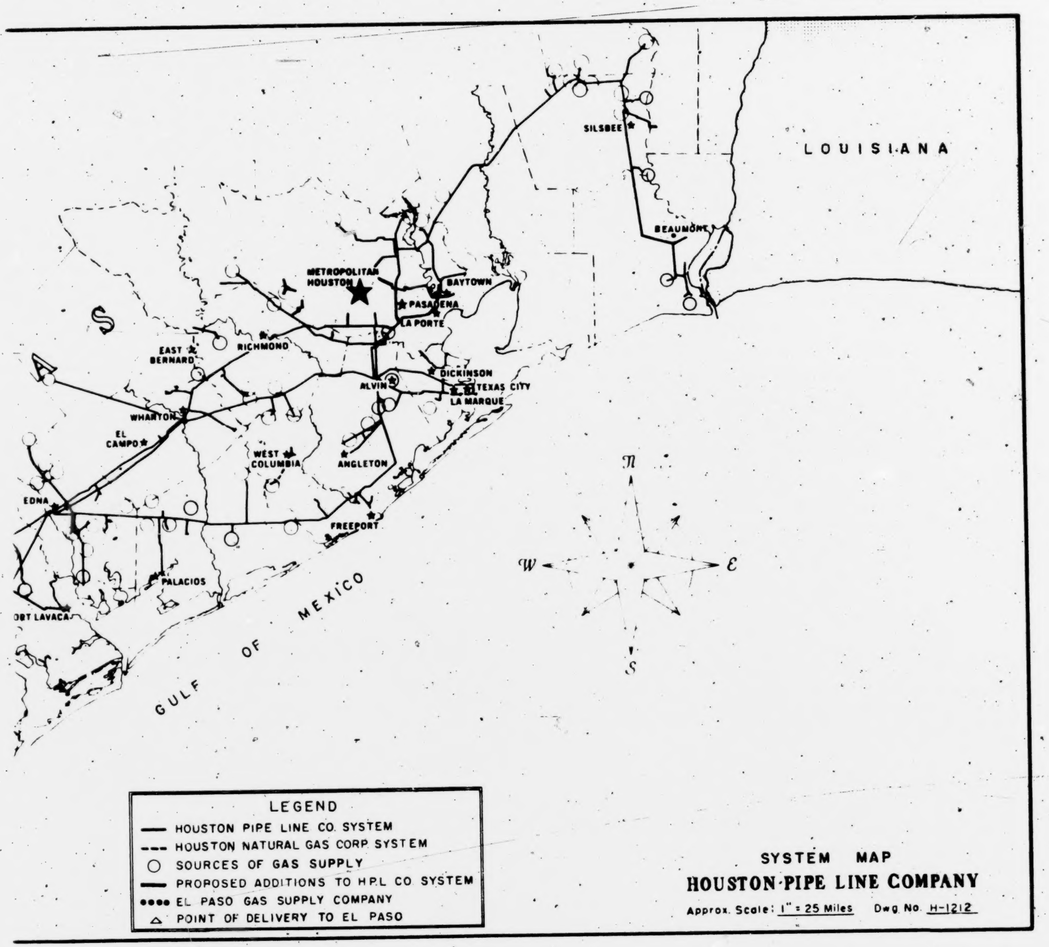
Presiding Examiner: Will you read the question, please?

(Question read.)

The Witness: No, we have not made a definite determination, Mr. Ormasa. We will undoubtedly have days where our requirements, due to the main line requirements, are less than they would be on the average day. We will have to adjust our intake from Houston accordingly and we know historically what that variation is, and we have certain relationships—factors that we can apply to be on the safe side to be very sure that we take no more gas from Houston that what we burn in those plants on that particular day.

• • • • • • • • • • •





SYSTEM MAP

HOUSTON PIPE LINE COMPANY

Approx. Scale: 1" = 25 Miles Dwg No. H-1212

416

Docket No. CP61-177

Exhibit No. 2

Witness: Wimberly

CONTRACT FOR PURCHASE AND SALE OF GAS BETWEEN HOUSTON PIPE LINE COMPANY AND EL PASO NATURAL GAS COMPANY

417

INDEX

. . . . . .

418

THE STATE OF TEXAS }
COUNTY OF HARRIS }

CONTRACT FOR PURCHASE AND SALE OF GAS

THIS AGREEMENT made and entered into this 19th day of July, 1960, by and between HOUSTON PIPE LINE COMPANY, a Texas corporation, hereinafter called "Houston", and EL PASO NATURAL GAS COMPANY, a Delaware corporation, hereinafter called "El Paso";

WITNESSETH:

WHEREAS, El Paso is engaged in the business of purchasing and gathering natural gas and the transmission and sale of such gas both within and without the State of Texas; and

WHEREAS, El Paso desires to purchase from Houston a supply of natural gas for consumption in the State of Texas as fuel in the operation of El Paso's plant (as hereinafter defined) and for consumption in the State of Texas as fuel

in the operation of a certain gasoline plant hereinafter referred to; and

WHEREAS, Houston has a supply of natural gas available for sale and delivery to El Paso for such fuel purposes, and Houston and El Paso desire to enter into an agreement to accomplish such sale in the particulars contained herein.

NOW, THEREFORE, in consideration of the mutual covenants, agreements and representations contained herein, the parties hereto mutually agree as follows:

419

ARTICLE I. DEFINITIONS.

The following words and terms, whenever used or appearing in this agreement shall have the following meaning:

(a) The term "day" shall mean a period of twenty-four (24) consecutive hours beginning at eight o'clock A.M. Central Standard Time on each calendar day and ending at eight o'clock A.M. Central Standard Time on the following calendar day.

(b) The term "month" shall mean the period beginning on the first day of each calendar month at eight o'clock A.M. Central Standard Time and ending on the first day of the next calendar month at eight o'clock A.M. Central Standard Time.

(c) The term "contract year" shall mean an annual period of twelve (12) consecutive months commencing on the first of the month next following the date of first deliveries hereunder. Each such annual period shall constitute a contract year under this contract.

(d) The term "date of first deliveries" shall mean that date following the testing and completion of the facilities

of both Houston and El Paso on which gas is first delivered by Houston into El Paso's facilities.

(e) The term "cubic foot of gas" shall mean the amount of gas contained in a cubic foot of space at a pressure of fourteen and sixty-five one hundredths pounds per square inch absolute (14.65# psia) and at a temperature of sixty degrees Fahrenheit (60°F.).

(f) The term "MCF" shall mean one thousand (1,000) cubic

feet of natural gas as determined on the measurement basis set forth in this agreement.

(g) The term "BTU" shall mean British thermal unit, and such term shall also mean British thermal units when used herein to indicate more than one such unit; and the term "gross BTU content" shall mean the number of BTU produced by the combustion, at constant pressure, of the amount of gas which would occupy a volume of one (1) cubic foot at a temperature of 60° Fahrenheit if saturated with water vapor and at a pressure of fourteen and sixty-five hundredths (14.65) pounds per square inch absolute (p.s.i.a.) with air of the same temperature and pressure as the gas, when the products of combustion are cooled to the initial temperature of gas and air, and when the water formed by combustion is condensed to the liquid state. Whenever the words "gross BTU content" are used herein, such words shall be deemed to mean gross BTU content as above defined.

(h) The term "annual load factor" as to any contract year shall be a fraction the numerator of which is the annual mathematical average delivery per day by Houston to El Paso during the contract year and the denominator

of which is the total delivery by Houston to El Paso on the peak day during the same contract year.

(i) The term "El Paso's plant" shall mean all facilities situated within the State of Texas now or hereafter owned and operated by El Paso in connection with its gas transmission pipe line system which consume gas as fuel, including, but not limited to, compressors, engines, boilers, treating plants, gas processing plants and camps.

421

ARTICLE II. LIMITATIONS AND COVENANTS.

2.1 It is recognized that the construction by El Paso of a separate network of service pipe lines running to the various components of El Paso's plant located in Texas for delivery of gas for fuel purposes would be unnecessary duplication of facilities and economically prohibitive. Accordingly, it is recognized that any gas purchased hereunder from Houston for such fuel consumption within Texas must necessarily be commingled with other gas being transported by El Paso in its pipe line system. In this connection, El Paso represents and covenants that gas to be purchased by El Paso from Houston hereunder shall be used and consumed by El Paso solely as fuel in the operation of El Paso's plant and in the gasoline plant of Phillips Petroleum Company in Ector County, all located wholly within the State of Texas. El Paso shall advise Houston as to each such utilization to be made of the gas purchased hereunder, and no new or different utilization of such gas shall be made by El Paso without the prior written consent of Houston. El Paso further covenants and agrees that at no time during the term of this agreement will El Paso take from Houston a quantity of gas in excess of the quantity of gas being consumed at the same time in Texas by El Paso for uses agreed to hereunder by Houston. If, by inadvertence or mistake or for any other reason, El Paso

shall at any time during the term hereof take from Houston hereunder a greater quantity of gas than is being so utilized, El Paso covenants that the same shall be sold or utilized by El Paso solely in intrastate commerce for use and consumption within the State of Texas.

422

2.2 El Paso covenants that all components of El Paso's plant consuming fuel gas hereunder shall physically be located on its system of pipe lines and laterals within the State of Texas through which the flow of gas, although commingled with other gas, shall at all times be continuous and downstream from the originating delivery point defined hereunder. A sufficient volume of the commingled stream of gas shall by said physical connections reach and pass into components of El Paso's plant located in Texas which consume in the aggregate a volume of gas as fuel equal to or greater than the volume of gas contributed into the commingled stream at Three Rivers by Houston. El Paso agrees to retain for a period of six (6) years and on demand will supply meter reading charts taken from meters at such points as may be necessary to enable proof to be made of the foregoing described continuous flow of gas.

2.3 On or before May 15, 1960, El Paso shall apply for, and thereafter pursue with due diligence until obtained or denied, a Certificate of Public Convenience and Necessity from the Federal Power Commission authorizing the construction of facilities necessary to transport the gas to be purchased hereunder running from the delivery point hereinafter designated to El Paso's pipe line system in the Permian Basin Area of West Texas. This contract and all amendments and supplements thereto, if any, shall be made a part of such application. Houston shall cooperate with El Paso in furnishing information necessary to reflect

to the Federal Power Commission that the quantities of gas which will be necessary to satisfy Houston's obligations under this agreement are available to Houston.

423

All expenses in connection with the preparation and presentation of such information (other than expenses ordinarily incurred by Houston in the normal operation of its business) shall be borne by El Paso.

ARTICLE III. CONDITIONS AND RIGHTS TO TERMINATE.

3.1 The obligation of Houston to sell gas under this agreement shall be subject to the following conditions:

(a) The order granting the Certificate of Public Convenience and Necessity referred to in Section 2.3 hereof shall have expressly recognized that the sale contemplated by this agreement is an intrastate transaction and, with respect to gas to be sold hereunder for use by El Paso in El Paso's plant, a sale for use and not for resale, and will not subject Houston or independent producers selling gas to Houston to the jurisdiction of the Federal Power Commission.

(b) In the event that El Paso shall receive a Certificate of Public Convenience and Necessity which shall fail, in the opinion of Houston's general attorneys, to expressly recognize that the sale contemplated by this agreement is an intrastate transaction, and, with respect to gas to be sold hereunder for use by El Paso in El Paso's plant, that it is one of direct sale not for resale, then Houston shall have the right to proceed independently before the Federal Power Commission to obtain a ruling satisfactory to it in this respect.

3.2 Houston shall have the right to terminate this agreement on the happening of any of the following contingencies:

424

(a) If the certificate referred to in Section 2.3 is denied by the Federal Power Commission, this agreement shall terminate upon the date the order denying such certificate becomes final.

(b) If the certificate referred to in Section 2.3 is not granted and accepted on or before September 1, 1960, Houston shall thereafter have the right to give thirty (30) days' prior written notice to El Paso of its intention to cancel this agreement, and if such certificate is not granted and accepted prior to the expiration of such thirty (30) day period this agreement shall thereupon terminate.

(c) Houston has already received from Messrs. Fulbright, Crooker, Freeman, Bates & Jaworski an opinion dated February 1, 1960 to the effect that the sale contemplated by this agreement is an intrastate transaction and will not subject Houston or independent producers selling gas to Houston to the jurisdiction of the Federal Power Commission. If at any time prior to the granting of the Certificate of Public Convenience and Necessity referred to in Section 2.3 above, Houston shall have received from Messrs. Fulbright, Crooker, Freeman, Bates & Jaworski an opinion that legislation, Federal Power Commission decision or judicial action requires a withdrawal or material revision of that opinion, this agreement shall terminate upon written notice of such opinion by Houston to El Paso.

(d) If the certificate referred to in Section 2.3 is granted but nevertheless is conditioned upon any revision of the price of gas to be sold or delivered hereunder or any other

425

substantial revision of this agreement, Houston shall have the right to terminate this agreement by giving written

notice of cancellation to El Paso and this agreement shall terminate upon receipt of such notice by El Paso.

(e) If the certificate referred to in Section 2.3 is granted but, in the opinion of Houston's general attorneys (such opinion to be rendered not later than fifteen (15) days after issuance and receipt by Houston of such certificate), does not expressly recognize that the sale contemplated by this agreement is wholly an intrastate transaction, and, with respect to gas to be sold hereunder for use by El Paso in El Paso's plant, that it is one of direct sale not for resale, and will not subject Houston or independent producers selling gas to Houston to the jurisdiction of the Federal Power Commission, Houston will have the right (notwithstanding Houston's right at its election to attempt to obtain a ruling satisfactory to it in this respect) to give written notice of termination to El Paso, at any time prior to issuance of an amended ruling or order by the Federal Power Commission recognizing the foregoing matters, and this agreement will immediately terminate upon receipt by El Paso of such notice of termination from Houston.

3.3 If the certificate referred to in Section 2.3 hereof is denied, or is granted but with significant changes of substance, or with conditions which require revision of the provisions of the agreements between El Paso and the independent producers or others supplying gas for the proposed facilities, El Paso shall have the right to terminate this agreement by giving written notice of

cancellation to Houston and this agreement shall terminate upon receipt of such notice by Houston.

ARTICLE IV. DELIVERY POINT AND FACILITIES.

4.1 The gas shall be delivered by Houston to El Paso at a site in the immediate vicinity of Three Rivers, Texas, to

be mutually agreed upon by Houston and El Paso. El Paso shall construct, with due diligence and at its risk and expense, all facilities necessary to enable El Paso to accept delivery of gas hereunder at said point of delivery.

4.2 Houston shall install, operate and maintain at said delivery point (at its cost and expense) all pipes, meters and other equipment necessary, in Houston's opinion, to measure the volume of gas delivered hereunder, and such facilities shall remain the personal property of Houston. El Paso may, at its option, install and operate (at its cost and expense) immediately downstream from the point of delivery such measuring equipment of standard type as will enable El Paso to check the volume of gas delivered to El Paso and measured by Houston's measuring equipment, and such check measuring facilities shall remain the personal property of El Paso.

4.3 The point of delivery for all gas delivered hereunder shall be at the outlet meter station header of Houston's meter station at the point of connection with El Paso's pipe line facilities. For the purpose of determining liabilities of the parties hereunder, El Paso shall take title to and responsibility for the gas at such

point of delivery. El Paso shall have no responsibility for the condition or operation of Houston's facilities upstream of said delivery point and Houston shall have no responsibility for the condition or operation of El Paso's facilities downstream of said delivery point.

ARTICLE V. QUANTITIES.

5.1 Subject to the terms, limitations and conditions of this contract, and specifically, subject to the terms set forth in Articles II, III and XVII hereof, Houston agrees

to sell and deliver to El Paso and El Paso agrees to purchase and take from Houston, if available, or pay for if available but not taken, during the term of this contract one thousand (1,000) MCF of gas each day, provided that so long as either (1) the Federal Power Commission or successor or similar United States governmental board, bureau or commission or other body performing similar functions does not have jurisdiction under the Natural Gas Act or similar or successor statute over the sale hereunder, or (2) Houston is willing to deliver the "annual contract quantity", as defined below in this Section 5.1, despite such jurisdiction in such body pursuant to such statute, then subject to the terms, limitations and conditions of this contract, Houston agrees to sell and deliver to El Paso and El Paso agrees to purchase and take from Houston, or to pay for if available but not taken, during each contract year of the term of this contract an "annual contract quantity" of 25,550,000 MCF of gas. If requested by El Paso, Houston may sell and deliver to

El Paso in excess of the annual contract quantity during any contract year, but Houston will not be obligated to sell or deliver in excess of the annual contract quantity to El Paso during any contract year except (and only) to the extent that El Paso may be entitled to receive "make-up" gas during such contract year under the provisions of Section 5.5 hereof.

5.2 El Paso shall endeavor to take the annual contract quantity during each contract year as nearly as practicable at uniform hourly and daily rates of flow (of approximately 70,000 MCF per day), but shall have the limited right to vary the daily rate of flow subject to the provision and limitation that such variations shall not be permitted to cause the "annual load factor" on deliveries by Houston

to El Paso to be less than 91/100ths for any contract year, and subject to the further limitation that Houston shall never be required to deliver at a rate in excess of 77,000 MCF of gas per day.

5.3 At the end of each contract year of the term hereof, if the quantity of gas taken by El Paso should be less than the annual contract quantity which El Paso is obligated to take under the preceding Section 5.1 (less any portion of such deficiency in takes excused by the other provisions of this agreement), then Houston shall render a statement to El Paso for the amount of such deficiency based upon the weighted average price paid by El Paso hereunder for gas during the contract year in which such deficiency occurred. Such statement for deficiency in takes shall be rendered by Houston to El Paso as soon as practicable after the end of such

contract year and within two (2) months thereafter, and El Paso agrees to pay Houston the amount of said statement within one (1) month after receipt thereof, or such rendition and payment may be made at such other times as the parties may agree hereafter.

5.4 El Paso shall make and transmit to Houston short term forecasts from time to time of the volumes of gas which El Paso will take hereunder during the periods covered by such forecasts. Such forecasts will usually be made by El Paso's dispatcher and may be transmitted to Houston either orally or in writing and in any pretical manner, including telephone, telegraph, through the mails or in person. Any such forecast shall be subject to change at any time by a subsequent forecast transmitted to Houston. Upon receipt of each such forecast Houston shall endeavor to deliver gas to El Paso in accordance therewith, but if Houston shall be unable, after reasonable notice, to deliver

(429)

the daily quantity of gas called for in any such forecast (which quantity shall not exceed delivery at a rate of 77,000 MCF per day), then, in such event:

(a) The annual contract quantity which El Paso is obligated to take during the then current contract year shall be reduced by an amount equal to the deficiency between the aggregate quantities of gas so requested by El Paso during the period of such inability and the aggregate quantities of gas actually delivered by Houston to El Paso during such period; and

430

(b) In computing the "annual load factor" on deliveries by Houston to El Paso during the then current contract year, it shall be deemed that the daily quantities so requested by El Paso were delivered hereunder for each day of the period of such inability, rather than the daily quantities actually delivered by Houston to El Paso during such period.

As an example of the operation of the provisions of this Section 5.4, if Houston is notified that El Paso desires to take the maximum required daily rate of 77,000 MCF and Houston can deliver only 70,000 MCF per day for three (3) days before the total required deliverability is restored, then the annual contract quantity for the then current contract year would be reduced by 21,000 MCF (i.e., a daily failure of deliverability of 7,000 MCF, for a period of three days).

5.5 Subject to the limitation hereafter set out, if the quantity of gas taken by El Paso hereunder during any contract year of the term hereof, for reasons not excused by the provisions of this contract, should be less than the annual contract quantity of gas El Paso is obligated to take during such contract year under the provisions of this

agreement, and El Paso is thereby required to pay Houston under the provisions of Section 5.3 for a quantity of gas which El Paso has not in fact taken, then El Paso may make up such deficiency in takes as "make-up" gas during the next three succeeding contract years of the term hereof, but not

431

thereafter, by receiving gas during any such contract year in excess of the annual contract quantity of gas El Paso is obligated under the terms hereof to take during such contract year. After the annual contract quantity El Paso is obligated to take hereunder has been taken in any contract year, all gas taken thereafter during such contract year shall be considered make-up gas to the extent El Paso has theretofore paid for gas not taken which it has an unexpired right to make up under the provisions of this contract. With respect to all such make-up gas, the parties shall determine the price which would have been payable for an equivalent quantity of gas sold by Houston to El Paso hereunder under the pricing provisions of Article X and the tax reimbursement provisions of Article XI as of the month during which such make-up gas is actually taken; and if such resulting price (including tax reimbursement) is the same as or less than the price theretofore paid to Houston at the end of the contract year during which such deficiency occurred, no further payment shall be made to Houston by El Paso, but if such resulting price (including tax reimbursement) is greater than such price theretofore paid to Houston for gas not taken, El Paso shall pay such difference to Houston at the time of the next regular monthly billing. In the above computations, the amounts previously paid by El Paso for gas not taken (and which El Paso has an unexpired right to make up) shall be applied on a first-in first-out basis in determining whether any payment is due with respect to make-up gas.

(431)

5.6 Notwithstanding the provisions of Section 5.1 above, it is agreed that during any period when El Paso is render wholly

432

or partially unable to take gas which would otherwise be delivered to El Paso hereunder, by reason of the operation of the porvisions of Article XIV hereof then in each such event, at the end of the then current contract year:

(a) The "average hourly deliveries" during said contract year shall be determined by dividing the sum of a number equal to the aggregate quantity of MCF of gas actually delivered to El Paso hereunder during such contract year plus a number equal to the aggregate quantity (if any) of MCF by which the annual contract quantity during such contract year is reduced by virtue of the provisions of Section 5.4 above, by a number equal to the aggregate number of hours during said contract year when gas was actually being delivered hereunder.

(b) In the event that El Paso has been rendered wholly unable to take gas by reason of the operation of the provisions of Article XIV hereof, then for each hour during which such inability shall continue, the annual contract quantity of gas which El Paso is required to take during the then current contract year shall be reduced by an amount equal to the "average hourly deliveries" during such contract year.

(c) In the event that the ability of El Paso to take gas has been partially impaired by reason of the operation of the provisions of Article XIV hereof, then for

433

each hour during which such impairment shall continue, the annual contract quantity of gas which El Paso is

required to take during the then current contract year shall be reduced by an amount equal to the deficiency between the "average hourly deliveries" during such contract year and the quantity of gas actually taken by El Paso during such hour.

ARTICLE VI. PRESSURE AND QUALITY.

6.1 The gas to be delivered by Houston to El Paso hereunder shall be delivered at such varying pressures as El Paso may require; provided, however, Houston shall not be obligated to deliver at any time hereunder at a pressure in excess of five hundred fifty pounds (550#) per square inch gauge.

6.2 All gas delivered shall be natural gas containing not more than one and one-half (1½) grains of hydrogen sulphide nor more than thirty (30) grains of total sulphur per one hundred (100) cubic feet, nor more than three per cent (3%) by volume of carbon dioxide. Said gas shall have a BTU content of not less than nine hundred fifty (950) BTUs per cubic foot and shall be reasonably free from objectionable liquids and foreign matter.

ARTICLE VII. MEASUREMENT.

7.1 The volume of gas measured hereunder shall be computed for all purposes of this contract as follows:

(a) The atmospheric pressure shall be assumed to be 14.65 psia. at the point of measurement irrespective of the actual atmospheric pres-

sure at the point of measurement from time to time.

(c) For positive displacement meter measurement, the specifications, coefficients, factors, and calculations shall be those prescribed by or in the A.G.A. Gas

Measurement Committee Report No. 3. For all gas measured at a pressure of less than 500 psig., the manometer factor will be assumed to be unity.

(c) For positive displacent meter measurement, the installation specifications, methods of testing, factors, and calculations shall be those prescribed by or in the American Meter Company's Handbook E-4.

7.2 For orifice meter measurement, the deviation of the gas from Boyle's Law at the pressures, temperatures, and specific gravities under which the gas is delivered shall be read from the A.G.A Convenient Operating Tables of "Supercompressibility Factors of Natural Gas". No adjustment for diluents, based upon a chemical analysis of the gas involved, shall be made to these factors if the adjustments amount to less than two-tenths of one per cent (.2%) plus or minus from the A.G.A. Hydrocarbon Tables. For measurements using positive displacement meters, the factor to be used will be the square of the above named factor. If the conditions of pressure, and or diluents in the gas are not within the range of these tables, then other accepted methods mutually agreed upon by Houston and El Paso shall be used in determining the deviation from Boyle's Law.

7.3 The flowing temperature of the gas being metered shall be determined continuously during periods when gas is being delivered, by means of a recording thermometer of standard make acceptable

to both parties, and the arithmetical average of the temperature recorded during periods of flow only shall be deemed the gas temperature, and shall be used in computing the volumes of gas delivered hereunder.

7.4 The specific gravity of the gas delivered hereunder shall be determined by a recording gravitometer of approved type, or such other method as may be agreed upon by both parties.

7.5 When a recording gravitometer is used, the arithmetical average of the gravity recorded during periods of flow only shall be used for computation purposes for each chart period.

ARTICLE VIII. METER TEST.

8.1 At least once a month and so far as convenient and practicable, upon the corresponding days of each month, Houston shall calibrate its orifice meters and appurtenant instruments, and at least once each three months, Houston shall calibrate its positive displacement meters, all in the presence of representatives of El Paso, as hereinafter provided, and the parties shall jointly observe any adjustment made. If the aggregate error in these measuring devices is found on test to register not more than two per cent (2%) in volume fast or slow, they shall be deemed to be correct. All the measuring devices mentioned above shall be adjusted upon test to register accurately within the tolerances allowed by their respective manufacturers. In the event that the aggregate error in these measuring devices is more than two per cent (2%) fast or slow in volume, adjustments shall be made by applying the percentage of error to the volume involved during the time the

metering equipment was out of calibration if this period can be ascertained. If the time when the metering equipment got out of calibration cannot be ascertained, then the percentage of error will be applied to the volume delivered for one-half (½) the time elapsed since the date of the last calibration. During the time any meter is out of re-

pair or is being tested, or in the event of a sudden failure of any meter to register accurately for any period, within the two per cent variation allowed herein, if it is not feasible to install another meter, the volume of gas passed shall be estimated until a new or repaired meter is installed, and adjustment and settlement shall be made at the regular monthly periods on the basis of the amount of gas registered at like pressures and for like periods of time when the meter was registering accurately.

8.2 If El Paso shall exercise its right of installing and operating check meters as authorized by Section 4.2, then, in the event and only in the event of failure of the meters of Houston to register accurately at any time (allowing for the variations above mentioned), the registration of the meters of El Paso, instead of the estimated quantities above provided for, shall be taken as the correct quantity of gas delivered (provided that the meters of El Paso are correct within the above variations) until such time as the meter or meters of Houston shall be adjusted, repaired or replaced. The meters of El Paso hereunder shall be tested and adjusted and the charts therefrom shall be handled and preserved by El Paso in the same manner as is herein provided with respect to meters of Houston, and Houston shall be entitled to

have access to El Paso's meters at all reasonable times in the presence of El Paso's representatives.

8.3 Each party shall give the other party notice of the time of all tests of meters and appurtenant instruments sufficiently in advance of the holding of the tests so that the other party may conveniently have its representatives present; provided, however, that if either party has given such notice to the other party and the other party is not present at the time specified, then the party giving the

notice may proceed with the tests as though the other party were present.

ARTICLE IX. HEAT CONTENT.

9.1 The gross BTU content of the gas delivered hereunder shall be determined by a recording calorimeter of approved type, or by such other method as may be agreed upon by both parties, so located as to measure properly the heat content of the gas delivered.

9.2 When a recording calorimeter is used, the arithmetical average of the recordings during periods of flow only shall be used for computing purposes for each chart period.

9.3 In determining the BTU per cubic foot to be used for the purpose of computing billing hereunder, the gross BTU content of the gas thus obtained shall be corrected from the water vapor content of the gas under testing conditions to the average water vapor content of the gas being delivered.

9.4 The degree of saturation by water vapor of the gas delivered hereunder shall be determined at least once a month on

a day as near the first (1st) day of the month as practicable.

9.5 Nothing herein provided shall be construed as obligating El Paso to accept gas containing less than nine hundred and fifty (950) BTU per cubic foot, and the purchase obligation of El Paso hereinabove provided may, at El Paso's election, be proportionately suspended and inoperative during any period while gas having a BTU content of less than 950 BTU per cubic foot is tendered by Houston to El Paso for acceptance, but in the event that El Paso should elect to accept such gas, the purchase obligation of

El Paso shall remain unchanged and payment shall be made therefor at the price herein fixed. The provisions of this section shall not be construed as relieving Houston of its obligation to deliver gas under the provisions of this agreement having a BTU content as stated in Section 6.2 hereof.

ARTICLE X. PRICE.

10.1 The unit of sale for all natural gas sold and delivered during the term of this agreement shall be one million (1,000,000) BTU, as determined in accordance with the provisions of Article IX hereof.

10.2 Subject to the adjustments herein provided, the unit price for each one million (1,000,000) BTU of natural gas delivered under the terms of this contract during each month shall be an amount equal to the sum of the amounts specified in paragraphs (a), (b) and (c), to wit:

(a) the fixed sum of six and one-eighth cents (6⅛¢);

PLUS

(b) Houston's "weighted average cost per MCF" (as hereinafter defined) applicable for such month;

PLUS

(c) Any increased price per 1,000,000 BTU required to be paid under the provisions of Section 10.4 below.

10.3 Houston's "weighted average cost per MCF" as used herein shall mean Houston's weighted average cost per MCF of gas in the preceding month with respect to all of the various sources of supply of Houston from which it purchased or received gas during that month, without regard to whether such sources of supply of Houston

provide gas for sale and delivery to El Paso hereunder. Houston's weighted average cost shall be its weighted average cost for one thousand (1,000) cubic feet of gas measured at sixty degrees Fahrenheit (60°F.) temperature and 14.65 pounds per square inch absolute pressure, adjusted for deviation from Boyle's Law. Houston's "weighted average cost per MCF" for the month of October, 1959, computed in accordance with the foregoing, was 13.375¢ per MCF. Accordingly, the price for each one million BTU delivered in accordance with this agreement during the billing month of November, 1959, would have been 19.5¢. Corrected billings shall be rendered by Houston to El Paso and paid by El Paso or refunded or credited

440

by Houston, as the case may be, in each instance in which the actual and ultimate weighted average cost of Houston with respect to a particular calendar month shall be determined to be at variance with the weighted average cost of Houston with respect to such month theretofore made the basis of billing and payment hereunder. El Paso shall at all reasonable times have the right to inspect and check in the offices of Houston the records and calculations of Houston pertaining to the determination of such weighted average cost.

10.4 The price for each one million (1,000,000) BTU of gas sold during each billing month hereunder shall be increased, or decreased, as the case may be, at the rate of two mils ($.002) for each twenty-five cents ($.25) increase or decrease after December 31, 1959, in the arithmetical average of the "Average Hourly Gross Earnings" of non-supervisory employees and production workers of the Fabricated Metal Products Group and of the Gas and Electric Utilities Group compiled by the United States

Department of Labor, Bureau of Labor Statistics, and officially reported on a monthly basis by the United States Department of Commerce, Office of Business Economics, in a publication currently entitled "Survey of Current Business"; provided, however, that no decrease or decreases in said "Average Hourly Gross Earnings" shall ever operate under the terms of this contract to reduce the price for each one million (1,000,000) BTU below the price of six and one-eights cents (6⅛¢) plus Houston's "weighted average cost per MCF" as defined in Section 10.3. A base "Average Hourly Gross Earnings" figure shall be

determined by (1) weighting equally the figures reported monthly as "Average Hourly Gross Earnings" of the said Fabricated Metal Products Group and the Gas and Electric Utilities Group and (2) averaging such monthly reported figures for the six (6) month period ending nearest to December 31, 1959.

"Average Hourly Gross Earnings" figures shall be computed on a comparable basis for each six months period ending the first and third quarters of each calendar year. Variations of said "Average Hourly Gross Earnings" from the base figure shall be applied (by use of the formula provided in the next paragraph) to adjust the price herein in the corresponding six-month period of the next following year.

The formula to be used for adjustment as a result of variations from the base figure shall be the product of two mils times a fraction the numerator of which is the variation from the base figure and the denominator of which is twenty-five cents ($.25).

Such computation shall be calculated to the nearest one hundredth of a mil.

Corrected billings covering the appropriate period or periods shall be rendered by Houston to El Paso and paid by El Paso or refunded or credited by Houston, as the case may be, for each month in which a retroactive revision of the previously reported "Average Hourly Gross Earnings" is published at variance with figures previously applied.

442

ARTICLE XI. TAXES

11.1 With respect to all gas sold and delivered by Houston to El Paso hereunder, El Paso contracts to pay unto Houston, in addition to the other sums payable to Houston under this contract, the full amount of any new or additional or increased or subsequently applicable production, distribution, sales, excise, gross receipts, severance, use, occupation, gathering, transportation, street rental, license, transmission or any other taxes or charges of every kind and character (excepting ad valorem, franchise, excess profits and income taxes), whether of a nature similar to those specifically enumerated or of an entirely different character, levied, assessed, fixed or charged by any municipal or governmental authority against Houston or its business in connection with or attributable to or allocable to the volume, value or gross receipts from the sale or delivery or handling of gas delivered to El Paso hereunder or against such gas itself or the act, right or privilege of the ownership, production, severance, handling, transmission, compression, distribution, sale or delivery of such gas, whether such tax or charge be based upon the volume, value or gross receipts from the sale or delivery or handling of such gas, or upon some other basis, to the extent that such taxes or charges (if they represent increases of taxes existing and in effect on the date specified hereinafter) shall exceed those being paid by Houston as of December 15, 1959, or (if such taxes

or charges are new or different taxes or charges not in existence or in effect as of the date hereinafter specified—as distinguished from increases in existing taxes in effect on such

date) to the full extent of such additional taxes or charges imposed or becoming effective after December 15, 1959. No reimbursement shall be made to Houston under the provisions of this Article from El Paso for any taxes included in Houston's "weighted average cost per MCF", as said term is used in Article X of this agreement.

11.2 The amount of such taxes or charges for which payment is due hereunder shall be billed by Houston to El Paso monthly or at the end of each contract year, at the election of Houston, and shall be paid by El Paso to Houston, at Houston, Texas, within fifteen (15) days after receipt of such billing.

ARTICLE XII. BILLING AND PAYMENT.

12.1 Houston shall, on or about the tenth (10th) day of each calendar month, render a statement to El Paso showing the quantity of gas and the number of BTU delivered at the point of delivery hereunder to El Paso during the preceding calendar month and the amount payable therefor by El Paso, together with any other amounts payable to Houston under the provisions of this contract. El Paso agrees to pay Houston at Houston, Texas, the full amount payable according to such statement within fifteen (15) days following receipt thereof by El Paso. At the end of each contract year or other appropriate period specified herein, Houston shall also submit to El Paso an appropriate statement for any defficiency in required takes by El Paso hereunder, in accordance with the terms hereof.

12.2 All meter charts, when removed from the meters of

444

Houston, shall be forwarded to Houston's office for computation and check, where they shall be placed in permanent files. Should El Paso elect to check or inspect said charts after they have been placed in such permanent files, Houston shall forward said charts to El Paso as may be directed for check and inspection, and El Paso shall promptly make such check and inspection and shall return said charts to be kept in said permanent files for the future reference of both parties hereto for a period of two (2) years after the end of the period to which such charts relate. Similarly, El Paso shall forward to El Paso's office all meter charts when removed from the check meters of El Paso, and retain same for reference and inspection by Houston in like manner.

ARTICLE XIII. TERM.

13.1 This contract, unless sooner terminated in accordance with the provisions hereof relating to cancellation and termination, shall exist for a period of twenty (20) contract years, commencing on the first (1st) of the month next following the date of first deliveries hereunder; provided, that first deliveries of gas hereunder shall commence as soon as El Paso shall have completed construction of its facilities referred to in Article IV hereof, following issuance of a Certificate of Public Convenience and Necessity acceptable to the parties hereto (as provided in Article III hereof), and in any event not later than two hundred and ten (210) days after the issuance of such acceptable certificate, delays due to force majeure alone excepted. It is agreed that as to any gas

445

delivered by Houston to El Paso hereunder prior to the beginning of the first contract year such gas shall be deemed

to have been delivered during the first contract year of the term hereof. Unless otherwise agreed to in writing by Houston and El Paso, this agreement shall automatically continue in force from year to year after the expiration of the term hereof, subject to termination at the option of either party hereto upon the giving of ninety (90) days' written notice to the other party.

ARTICLE XIV. FORCE MAJEURE.

14.1 In the event that either party is rendered unable, wholly or in part, by force majeure or other causes herein specified, to carry out its obligations under this contract other than the obligation to make payments of amounts due hereunder, it is agreed that on such party's giving notice and reasonably full particulars of such force majeure in writing or by telegraph to the other party within a reasonable time after the occurrence of the cause relied on, then the obligations of the party giving such notice, so far as they are affected by such force majeure or other causes herein specified, shall be suspended during the continuance of any inability so caused, but for no longer period, and such cause shall so far as possible be remedied with all reasonable dispatch.

14.2 The term "force majeure" as employed herein shall mean acts of God, strikes, lockouts, or other industrial disturbances, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms,

floods, washouts, arrests and restraints of the government, either federal or state, civil or military, civil disturbances, explosions, breakage or accident to machinery or lines of pipe, freezing of wells or lines of pipe, partial or entire failure of natural gas wells or gas supply, depletion of gas

reserves, and any other causes, whether of the kind herein enumerated or otherwise, not reasonably within the control of the party claiming suspension, and which by the exercise of due diligence such party is unable, wholly or in part, to prevent or overcome. Such term shall likewise include (1) in those instances where either party hereto is required to obtain servitudes, right-of-way grants, permits or licenses to enable such party to fulfill its obligations hereunder, the inability of such party to acquire, or the delays on the part of such party in acquiring, at reasonable cost and after the exercise of reasonable diligence, such servitudes, right-of-way grants, permits or licenses, and (2) except as provided in Articles II, III and XVII of this agreement, in those instances where either party is required to furnish materials and supplies for constructing or maintaining facilities or is required to secure permits or permission from any governmental agency, federal, state or municipal, civil or military, to enable such party to fulfill its obligations hereunder, the inability of such party to acquire, or the delays on the part of such party in acquiring, at reasonable cost and after the exercise of reasonable diligence, such materials and supplies, permits and permissions. It is understood and agreed that the settlement of strikes or lockouts shall be entirely within the

discretion of the party having the difficulty and that the above requirement that any force majeure shall be remedied with all reasonable dispatch shall not require the settlement of strikes or lockouts by acceding to the demands of the opposing party when such course is inadvisable in the discretion of the party having the difficulty.

14.3 It is understood that either party may, without liability to the other party, interrupt the operations of its pipeline system for the purpose of making necessary

alterations or repairs thereto, but that such interruption shall be for only such time as may be reasonable. The party interrupting operations shall give the other party reasonable notice, except in case of emergency, of its intention so to interrupt operations and of the estimated time during which no gas will be taken or delivered, as the case may be.

ARTICLE XV. IMPAIRMENT OF DELIVERIES.

15.1 It is recognized that Houston delivers gas to gas utilities for resale to domestic consumers. In the event a shortage of gas renders Houston unable to supply the full gas requirements of all its customers, then it is mutually agreed that the gas requirements of gas utilities selling gas to domestic consumers shall first be supplied by Houston, and the remaining available gas shall be prorated by Houston among its other customers, including El Paso.

15.2 If as a result of the proration of gas by Houston pursuant to the provisions of Section 15.1 of this Article the

average daily quantity of gas available for delivery hereunder by Houston to El Paso shall be reduced for as long as three consecutive months below 70,000 MCF per day, the respective obligations of Houston to sell and deliver gas to El Paso and of El Paso to purchase and receive gas from Houston, or pay for the same whether or not received, shall, at El Paso's election, be reduced for the remaining term of this agreement in the proportion that the average daily quantity of gas available for delivery by Houston to El Paso hereunder during such three months period shall bear to 70,000 MCF. The right granted to El Paso in this section may be exercised by El Paso each time any such

reduction shall occur as the result of proration of gas by Houston pursuant to the provisions of Section 15.1 of this Article.

ARTICLE XVI. TRANSPORT GAS.

16.1 Houston may, at its option, arrange for El Paso, or its nominee, to purchase gas for transportation or exchange under this agreement. The quantity so taken into Houston's system from El Paso shall be replaced by an equivalent quantity delivered at the delivery point provided in Article IV of this agreement. All cost, risk and expense in connection with taking such gas into Houston's system shall be borne by Houston, and subject to El Paso's taking the quantities agreed to in Article V of this agreement, Houston shall be responsible for taking the minimum quantities agreed to be taken under any such contract. During each billing period Houston will credit El Paso with the amount paid by El Paso

for gas purchased and delivered to Houston as transport gas during such billing period. It is expressly agreed that Houston shall have the right and power, in its sole discretion and at its election, at any time and from time to time prior to or at the termination of this contract, without cost to Houston, to require an immediate assignment or re-assignment from El Paso (or El Paso's nominee) to Houston, or Houston's assignee or nominee, of all or any share of, or undivided interest in, the right, title and interest of El Paso (or El Paso's nominee) in, to and with respect to any one or more or all of any gas purchase contracts held by El Paso (or El Paso's nominee) for the purchase of transport gas under the foregoing provisions of this Section 16.1; additionally, Houston shall be obligated and required to accept (either in its own name or in the name of some nominee by Houston) a re-assignment

(449)

or assignment from El Paso (or its nominee) of any or all such purchase contracts which may be held by El Paso (or its nominee) for the purchase of transport gas under the foregoing provisions of this Section 16.1, at the time of termination of this contract (regardless of the reason for such termination), in the event such assignment or re-assignment is tendered by El Paso (or its nominee) within thirty (30) days after the date of termination of this contract.

ARTICLE XVII. INTERSTATE COMMERCE.

17.1 Representatives and counsel of both El Paso and Houston consider that the sale and transportation of gas to El Paso as provided in this agreement are exclusively in intrastate commerce,

450

and do not constitute a sale, resale or transportation in interstate commerce, as defined in the Natural Gas Act (June 21, 1938, c. 556, Sec. 24, 52 Stat. 833, Ch. 15.13, Title 15, U.S.C.A., Sec. 717-717W), as amended (herein called the Natural Gas Act"), as construed by the courts (federal and state) having jurisdiction of the subject matter thereof. However, in the event that the sale or the transportation of any gas hereunder shall ever prove to be or shall ever become a sale or a transportation, or both, of gas in interstate commerce under the terms of the Natural Gas Act, as heretofore or hereafter amended, or in substitute legislation covering the same or similar subject matter, then Houston shall have the right, at its option, to immediately cancel and terminate this contract, by written notice thereof to El Paso.

17.2 In the event that a bill is passed by both Houses of Congress which would, in the opinion of Houston's general attorneys, extend the application of the Natural Gas Act (or any substitute or supplemental federal legis-

lation covering the same or similar subject matter) and the jurisdiction of the Federal Power Commission (or any successor federal agency, commission or board performing the same or similar functions with respect to the gas industry) so as to cover and include the sale or transportation of gas hereunder by Houston and so as to render Houston, or the sale to Houston by independent producers selling gas to Houston, subject to such federal legislation and to the jurisdiction of such federal agency, commission or board by reason of the sale or transportation of gas hereunder by Houston, then in each such event (subject to the provision set out

hereinafter), Houston shall have the right to terminate this agreement by giving written notice of cancellation to El Paso and this agreement shall terminate upon receipt of such notice by El Paso; *provided* that, although this agreement will have fully terminated upon receipt of such notice by El Paso, this agreement may be reinstated at the election of either El Paso or Houston and shall thereafter be and continue in full force and effect in the event the President shall veto such bill, upon the giving of written notice of reinstatement by either party to the other at any time within ten (10) days after such Presidential veto, and the period of time between such termination by Houston and the date of such reinstatement shall thereafter be considered and treated for all purposes hereunder in the same manner as a period of inability of Houston to make deliveries as provided in Article XIV hereof; *provided, further*, that in the event such Presidential veto shall thereafter be overridden by the vote of either House of Congress, this agreement shall immediately and automatically terminate without the necessity of any action on the part of either Houston or El Paso, as of the time of such vote by the *first* House of Congress to so override such

(451)

Presidential veto; and *provided, further,* however, that although this agreement will have fully terminated upon such vote by said first House of Congress, nevertheless in the event the *second* House of Congress to act thereon shall not override such Presidential veto by sufficient majority vote, then in such event this agreement may again be reinstated at the election of either El Paso or Houston and shall thereafter be and continue in full

452

force and effect upon the giving of written notice of reinstatement by either party to the other at any time within ten (10) days after such second House of Congress has completed action on such bill and has failed to override such Presidential veto and such bill has been finally removed from the calendar of such House of Congress, and in such event the period of time between termination of this agreement upon action by said first House of Congress as aforesaid and reinstatement of this agreement upon notice of reinstatement as aforesaid shall thereafter be considered and treated for all purposes hereunder in the same manner as a period of inability of Houston to make deliveries as provided in Article XIV hereof. It is, however, expressly stipulated and provided that the right of termination conferred upon Houston in this Section 17.2 shall be applicable and may be exercised *only* in the event that the new federal bill referred to in the preceding sentence is of such nature that Houston, or the sale to Houston by independent producers selling gas to Houston, would not, *but for* the existence of this agreement and the sale or transportation of gas hereunder by Houston, come within the scope of such bill. It is further expressly stipulated and provided that in the event this agreement is terminated in connection with proceedings for enactment of new federal legislation under the foregoing provisions of this Section 17.2, then in the further event that such new

federal legislation shall after enactment thereof be finally held and determined to be unconstitutional and invalid (as to all the provisions of the original legislative bill which constituted grounds for termination of this agreement under the foregoing

453

provisions of this Section 17.2) by final judgment of a court of competent jurisdiction not subject to further appeal, rehearing or review, then even though this agreement will have fully terminated on the date and in the manner hereinabove provided in this Section 17.2, this agreement may nevertheless be reinstated at the election of either El Paso or Houston and shall thereafter be and continue in full force and effect, upon the giving of written notice of reinstatement by either party to the other at any time within ten (10) days after such judgment becomes final as aforesaid; and, in such event, the period of time between such termination hereof and the date of such reinstatement shall thereafter be considered and treated for all purposes hereunder in the same manner as a period of inability of Houston to make deliveries as provided in Article XIV hereof.

17.3 If Houston's right to cancel and terminate this contract under any provision hereof is denied, suspended, canceled or rendered unenforceable by order of any court or governmental regulatory authority, federal or state, and no appeal shall have been taken from such order within the time within which such appeal may be taken or proceedings brought, or, such appeal having been taken or proceedings brought, they shall not have resulted in the final dismissal or stay of such order, then at any time thereafter Houston shall have the right to exercise either of the following options:

(a) Houston may isolate any portion or portions of Houston's then existing pipe line system from

the remaining portion thereof, and thereafter furnish the entire requirements of gas hereunder from gas reserves covered by gas purchase contracts of Houston or otherwise owned or controlled by Houston which are connected with and supplying gas to such isolated portion of said pipe line system and sufficient to satisfy the requirements of this contract for the then remaining term hereof. At Houston's election, this contract, together with such isolated portion of Houston's pipe line system and such designated purchase contracts covering said gas reserves may be assigned to any affiliated company of Houston or to any corporation to be formed by Houston.

(b) To designate specific gas purchase contracts or gas reserves otherwise owned or controlled by Houston sufficient to furnish the entire requirements of this contract for the remaining term hereof and dedicate all of same to the performance of this contract, thereby releasing from the provisions hereof all other facilities, contracts and reserves of Houston.

ARTICLE XVIII. WARRANTIES OF TITLE.

18.1 Houston warrants title to all gas delivered hereunder to El Paso at the point of delivery and agrees to indemnify El Paso from all suits, actions, debts, accounts, damages, costs, losses

and expenses arising from or out of adverse claims of any or all persons to said gas or to royalties or charges thereon. In like manner, El Paso warrants title to all gas delivered to Houston as transport gas and agrees to

indemnify Houston from all suits, actions, debts, accounts, damages, costs, losses and expenses arising from or out of adverse claims of any or all persons to said gas or to royalties or charges thereon.

ARTICLE XIX. NOTICES.

19.1 Notice to be given hereunder shall be deemed sufficiently served if and when deposited in the United States Certified Mail, with postage prepaid, addressed to Houston at its office in Houston, Texas, and to El Paso at its office in El Paso, Texas.

ARTICLE XX. SUCCESSORS AND ASSIGNS.

20.1 This agreement shall bind and benefit the parties hereto and their respective successors and assigns except that no conveyance or transfer of any interest of either party shall be binding upon the other party until such other party has been furnished with written notice and true copy of such convenyance or transfer; provided that either El Paso or Houston, or both, may assign its right, title and interest in, to and by virtue of this agreement, including any and all extensions, renewals, amendments and supplements thereto, to a trustee or trustees, individual or corporate, as security for bonds or other obligations or securities, without such trustee or trustees assuming

or becoming in any respect obligated to perform any of the obligations of the assignor, and, if any such trustee be a corporation, without its being required by the parties hereto to qualify to do business in the State of Texas. It is further expressly stipulated and provided that no assignment by either Houston or El Paso to any other person or party of any of their rights or interests under this contract shall have the effect of relieving said Houston

or El Paso, as the case may be, from full liability and financial responsibility for performance (both before and after any such assignment) of all the obligations and duties herein provided and imposed upon Houston and El Paso, respectively, nor shall any such assignment by El Paso have the effect of waiving or releasing or in any manner altering or changing whatsoever the express restrictions and covenants as to the use to be made of gas sold and delivered hereunder as provided and set out in Sections 2.1 and 2.2 of this contract.

ARTICLE XXI. MISCELLANEOUS.

21.1 This contract constitutes the entire agreement between the parties, and no other representations, memoranda, agreements or other matter, oral or written, prior to the time hereof, shall vary, alter or interpret the terms hereof. The side head captions and the index in this instrument are for convenience of the parties in identification of the provisions hereof and shall not constitute a part of the agreement nor be considered interpretative thereof. In the consideration and interpretation of this agreement, the following shall apply:

(a) This agreement was prepared jointly by the parties hereunder and not by either party to the exclusion of the other.

(b) Failure to exercise any right hereunder shall not be considered a waiver of such right or rights in the future.

(c) Time is of the essence with regard to all obligations to be performed on or by a specified date, if any, herein contained.

In Witness Whereof, the parties hereto have caused this instrument to be executed in duplicate originals of equal dignity as of the day and year first above written.

Attest:

E. McCarthy
Assistant Secretary

Houston Pipe Line Company

By Robert L. Dabney
Vice President

Attest:

.....
Assistant Secretary

El Paso Natural Gas Company

By D. H. Tucker
D. H. Tucker
Vice President

(Seal)

458

The State of Texas }
County of Harris }

Before Me, the undersigned authority, on this day personally appeared Robert L. Dabney, President of Houston Pipe Line Company, a Texas corporation, known to me to be the person and officer whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed, as the act and deed of said corporation and in the capacity therein stated.

Given under my hand and seal of office this the 19th day of July, 1960.

Bessie Barineau
Notary Public in and for
Harris County, Texas.

(Seal)

THE STATE OF TEXAS)
COUNTY OF HARRIS)

BEFORE ME, the undersigned authority, on this day personally appeared D. H. Tucker, Vice President of EL PASO NATURAL GAS COMPANY, a Delaware corporation, known to me to be the person and officer whose name is subscribed to the foregoing instrument, and acknowledged to be that he executed the same for the purposes and consideration therein expressed, as the act and deed of said corporation and in the capacity therein stated.

GIVEN under my hand and seal of office this the 19th day of July, 1960.

AUDREY JANE PUMPHREY
Notary Public in and for
Harris County, Texas.

(Seal)

459

Exhibit No. 4

ARGO OIL CORPORATION—HOUSTON PIPE LINE COMPANY

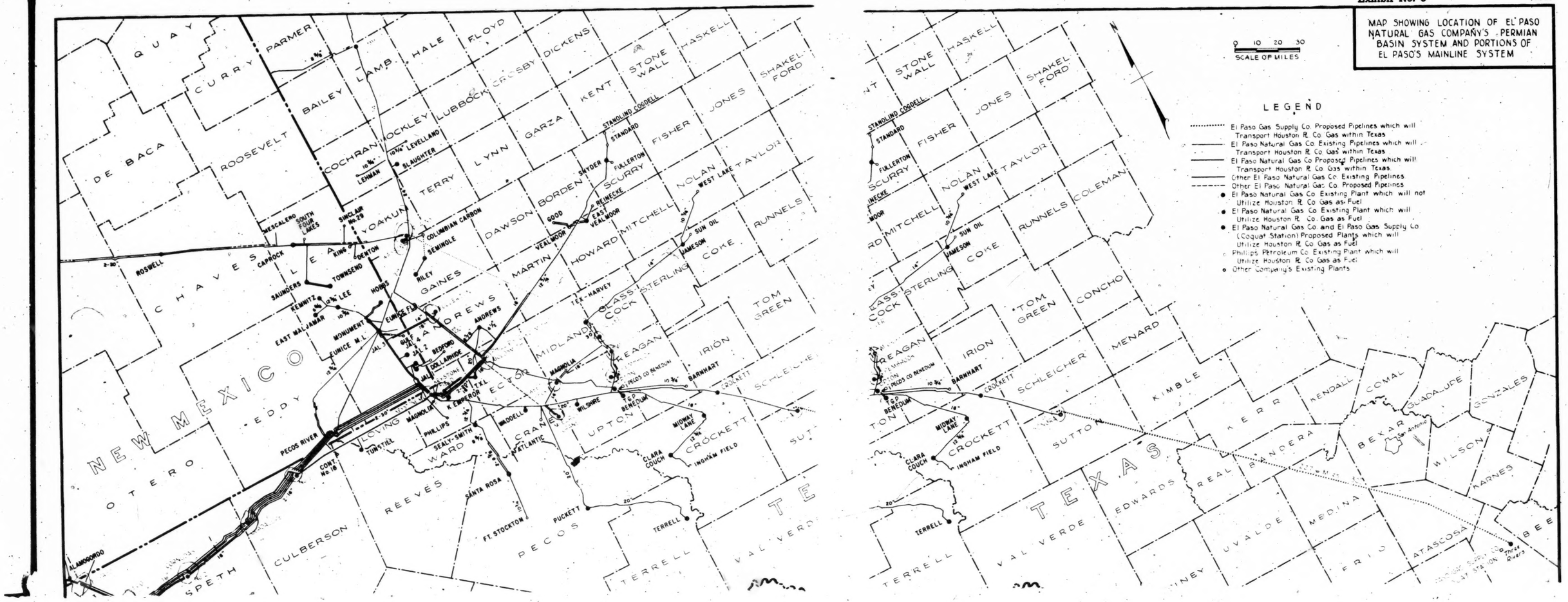
GAS PURCHASE CONTRACT

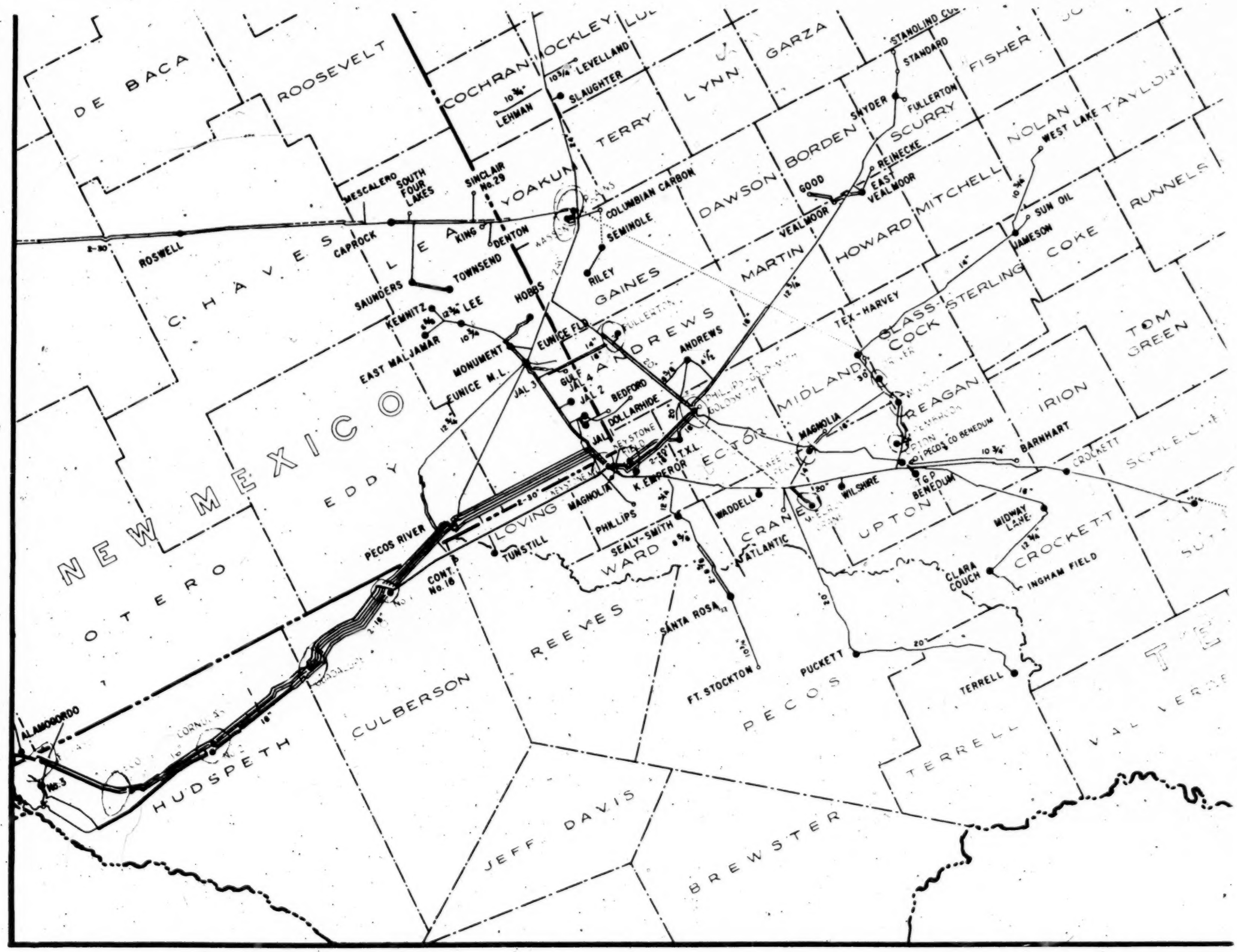
Dated November 15, 1958
Page 41

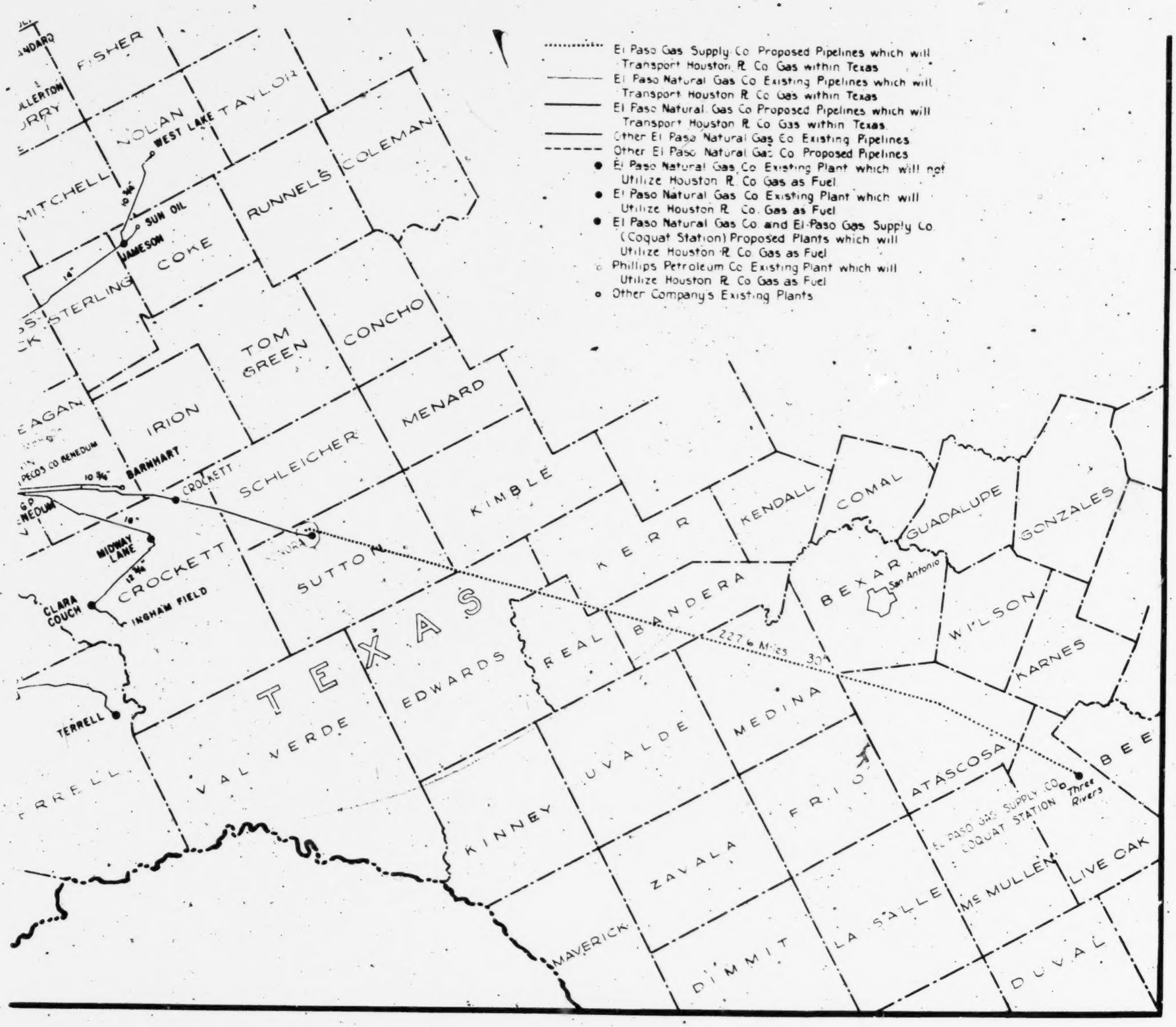
XVII. SALES BY BUYER IN INTERSTATE COMMERCE.

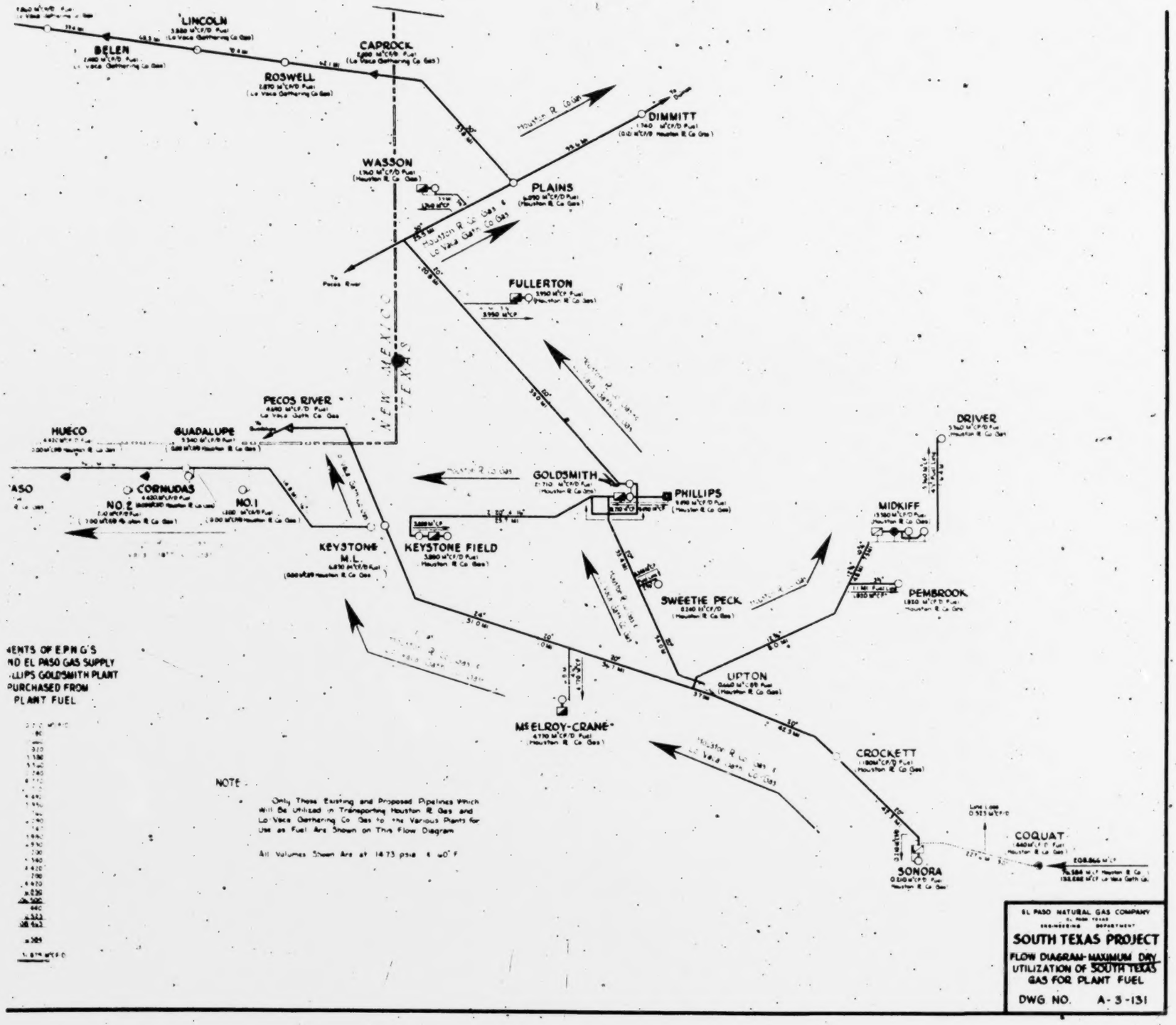
17.1 Buyer represents that Buyer has no present desire or intention that the gas delivered to Buyer by Seller hereunder be transported in interstate commerce or sold for resale in interstate commerce. If because of changed conditions which Buyer cannot now foresee, Buyer should desire to transport or sell gas delivered hereunder into interstate commerce, Buyer shall give Seller not less than sixty

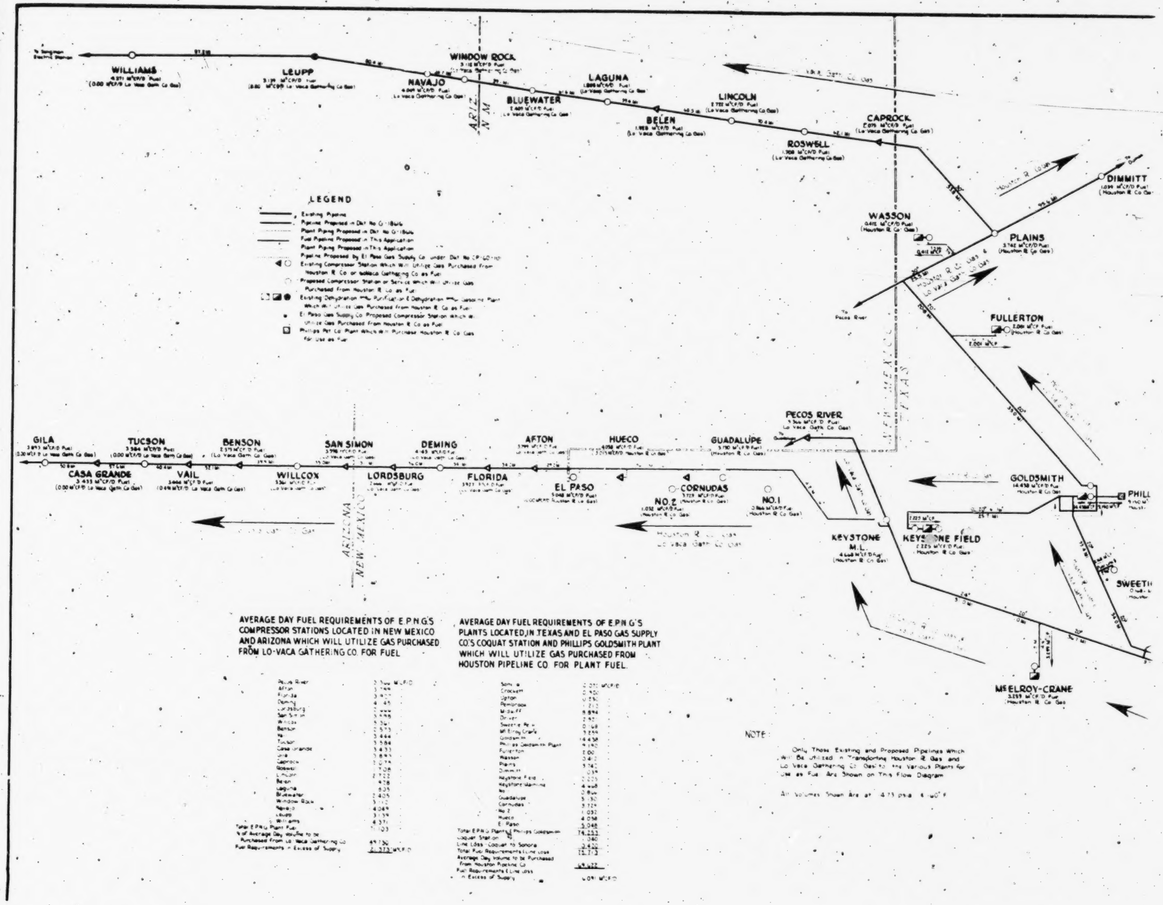
(60) days' prior written notice of its intention to sell or deliver any gas purchased hereunder for transportation, sale or resale in interstate commerce, as such term is defined in the Natural Gas Act (June 21, 1938, c. 556, Sec. 24, 52 Stat. 833, Ch. 1513, Title 15, U.S.C.A.), as heretofore or hereafter amended, or in substitute legislation covering the same or similar subject matter, and notwithstanding any other provision hereof, Seller shall have and is hereby given the continuing right and option to cancel and terminate this contract at any time during the period of fifty-five (55) days next following the receipt by Seller of any such notice from Buyer by the giving of written notice of such cancellation and termination to Buyer within such period of time, but not thereafter. The failure of Seller to cancel and terminate this contract according to the provisions of this Article XVII within such period after receipt of any such notice from Buyer shall be conclusively presumed to be an election by Seller not to cancel and terminate this contract and Seller shall thereafter be obligated to cooperate with Buyer in making the certificate applications, rate filings, and other filings in accordance with the said Natural Gas Act, as heretofore or hereafter amended, or as required in substitute legislation covering the same or similar subject matter.


MAP SHOWING LOCATION OF EL PASO NATURAL GAS COMPANY'S PERMIAN BASIN SYSTEM AND PORTIONS OF EL PASO'S MAINLINE SYSTEM
0 10 20 30
SCALE OF MILES
LEGEND
El Paso Gas Supply Co. Proposed Pipelines which will Transport Houston R. Co. Gas within Texas
El Paso Natural Gas Co. Existing Pipelines which will Transport Houston R. Co. Gas within Texas
El Paso Natural Gas Co. Proposed Pipelines which will Transport Houston R. Co. Gas within Texas
Other El Paso Natural Gas Co. Existing Pipelines
Other El Paso Natural Gas Co. Proposed Pipelines
El Paso Natural Gas Co. Existing Plant which will not Utilize Houston R. Co. Gas as Fuel
El Paso Natural Gas Co. Existing Plant which will Utilize Houston R. Co. Gas as Fuel
El Paso Natural Gas Co. and El Paso Gas Supply Co. (Coquat Station) Proposed Plants which will Utilize Houston R. Co. Gas as Fuel
Phillips Petroleum Co. Existing Plant which will Utilize Houston R. Co. Gas as Fuel
Other Company's Existing Plants
NEW MEXICO
TEXAS
QUAY
CURRY
ROOSEVELT
DE BACA
PARMER
BAILEY
LAMB
HALE
FLOYD
CASTRO
SWISHER
CROSBY
DICKENS
KING
KNOX
HASKELL
STONEWALL
JONES
SHACKELFORD
STEPHENS
YOUNG
THROCKMORTON
CHAVES
ROSWELL
CAPROCK
LEA
HOBBS
TOWNSEND
DENTON
SAUNDERS
KEMNITZ
EAST MALJAMAR
MONUMENT
EUNICE M.L.
EUNICE FLD.
OIL CENTER
BEDFORD
JAL
JAL 3
JAL 2
ANDREWS
ECTOR
MIDLAND
MARTIN
HOWARD
GLASSCOCK
STERLING
COKE
RUNNELS
COLEMAN
TOM GREEN
CONCHO
IRION
REAGAN
UPTON
CRANE
WARD
REEVES
PECOS
CULBERSON
HUDSPETH
TERRELL
VAL VERDE
CROCKETT
SUTTON
SCHLEICHER
MENARD
KIMBLE
EDWARDS
REAL
KERR
KENDALL
COMAL
BEXAR
San Antonio
GUADALUPE
GONZALES
WILSON
KARNES
BEE
ATASCOSA
FRIO
UVALDE
MEDINA
KINNEY
MAVERICK
LOVING
WINKLER
ECTOR
ANDREWS
GAINES
YOAKUM
TERRY
LYNN
GARZA
DAWSON
BORDEN
SCURRY
FISHER
NOLAN
TAYLOR
RUNNELS
COLEMAN
STANOLIND COODELL
STANDARD
FULLERTON
REINECKE
SNYDER
EAST VEALMOOR
VEALMOOR
GOOD
WEST LAKE
SUN OIL
JAMESON
TEX-HARVEY
MAGNOLIA
PECOS CO. BENEDUM
BENEDUM
BARNHART
MIDWAY LANE
CLARA COUCH
INGHAM FIELD
WILSHIRE
MIDDELL
ATLANTIC
K. EMPEROR
PHILLIPS
SEALY-SMITH
TUNSTILL
PECOS RIVER
COMT No. 16
SANTA ROSA
FT. STOCKTON
PUCKETT
TERRELL
SLAUGHTER
LEVELLAND
LEHMAN
SEMINOLE
COLUMBIAN CARBON
RILEY
SINCLAIR No. 29
SOUTH FOUR LAKES
LEE
ALAMOGORDO
10 3/4"
12 3/4"
14"
16"
18"
20"
24"
30"


DE BACA
ROOSEVELT
COCHRAN
HOCKLEY
LUBBOCK
LYNN
GARZA
STANOLIND CO.
STANDARD
FISHER
JONES
LEVELLAND
SLAUGHTER
LEHMAN
TERRY
YOAKUM
DAWSON
BORDEN
SNYDER
FULLERTON
SCURRY
NOLAN
TAYLOR
WEST LAKE
GOOD
REINECKE
EAST VEALMOOR
VEALMOOR
MARTIN
HOWARD
MITCHELL
SUN OIL
JAMESON
COKE
RUNNELS
COLUMBIAN CARBON
SEMINOLE
RILEY
CHAVES
ROSWELL
CAPROCK
MESCALERO
SOUTH FOUR LAKES
SINCLAIR No. 29
KING
DENTON
SAUNDERS
TOWNSEND
KEMNITZ
LEE
EAST MALJAMAR
MONUMENT
EUNICE M.L.
HOBBS
EUNICE FLD.
GAINES
ANDREWS
FULLERTON
TEX-HARVEY
GLASSCOCK
STERLING
TOM GREEN
MIDLAND
REAGAN
IRION
GULF
JAL 4
JAL 2
JAL 3
BEDFORD
DOLLARHIDE
JAL
KEYSTONE FIELD
T.X.L.
K. EMPEROR
MAGNOLIA
PHILLIPS
SEALY-SMITH
WARD
WADDELL
CRANE
ATLANTIC
UPTON
WILSHIRE
TGP BENEDUM
CO BENEDUM
BARNHART
MIDWAY LANE
CROCKETT
CLARA COUCH
INGHAM FIELD
SCHLEICHER
SUTTON
NEW MEXICO
EDDY
LOVING
TUNSTILL
PECOS RIVER
CONT. No. 16
OTERO
REEVES
SANTA ROSA
FT. STOCKTON
PUCKETT
PECOS
TERRELL
VAL VERDE
ALAMOGORDO
No. 3
HUDSPETH
CULBERSON
JEFF DAVIS
BREWSTER

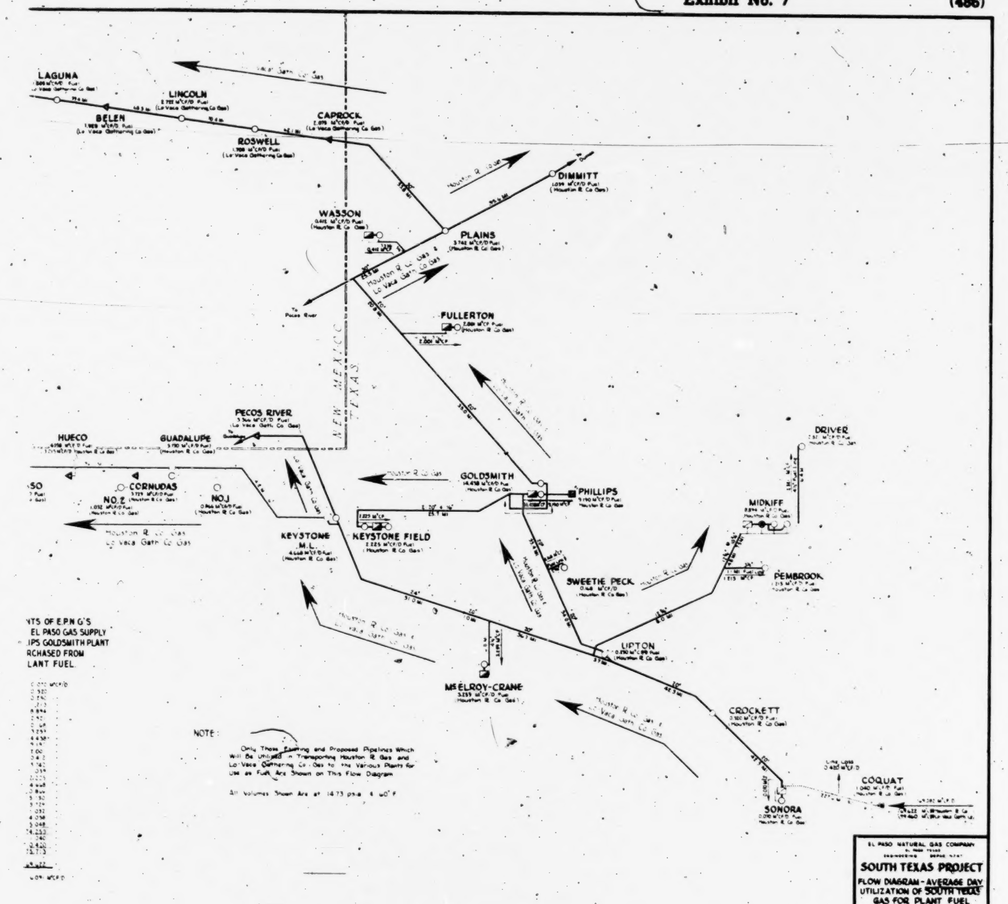

El Paso Gas Supply Co Proposed Pipelines which will Transport Houston Pl Co Gas within Texas
El Paso Natural Gas Co Existing Pipelines which will Transport Houston Pl Co Gas within Texas
El Paso Natural Gas Co Proposed Pipelines which will Transport Houston Pl Co Gas within Texas
Other El Paso Natural Gas Co Existing Pipelines
Other El Paso Natural Gas Co Proposed Pipelines
El Paso Natural Gas Co Existing Plant which will not Utilize Houston Pl Co Gas as Fuel
El Paso Natural Gas Co Existing Plant which will Utilize Houston Pl Co Gas as Fuel
El Paso Natural Gas Co and El Paso Gas Supply Co (Coquat Station) Proposed Plants which will Utilize Houston Pl Co Gas as Fuel
Phillips Petroleum Co Existing Plant which will Utilize Houston Pl Co Gas as Fuel
Other Company's Existing Plants
FISHER
NOLAN
TAYLOR
MITCHELL
WEST LAKE
SUN OIL
JAMESON
RUNNELS
COLEMAN
COKE
STERLING
TOM GREEN
CONCHO
IRION
EAGAN
MENARD
SCHLEICHER
BARNHART
CROCKETT
KIMBLE
SUTTON
KERR
KENDALL
COMAL
GUADALUPE
GONZALES
BEXAR
San Antonio
WILSON
KARNES
BANDERA
MIDWAY LANE
CLARA COUCH
INGHAM FIELD
TEXAS
EDWARDS
REAL
227.6 Miles
304
TERRELL
VAL VERDE
UVALDE
MEDINA
ATASCOSA
BEE
KINNEY
ZAVALA
FRIO
EL PASO GAS SUPPLY CO. COQUAT STATION
Three Rivers
MAVERICK
DIMMIT
LA SALLE
MCMULLEN
LIVE OAK
DUVAL


LINCOLN
BELEN
ROSWELL
CAPROCK
DIMMITT
WASSON
PLAINS
FULLERTON
PECOS RIVER
HUECO
GUADALUPE
CORNUDAS
NO. 2
NO. 1
GOLDSMITH
PHILLIPS
KEYSTONE M.L.
KEYSTONE FIELD
DRIVER
MIDKIFF
PEMBROOK
SWEETIE PECK
UPTON
McELROY-CRANE
CROCKETT
COQUAT
SONORA
NEW MEXICO
TEXAS
Houston R. Co. Gas
Pecos River
NOTE
Only Those Existing and Proposed Pipelines Which Will Be Utilized in Transporting Houston R. Gas and Lo Vaca Gathering Co. Gas to the Various Plants for Use as Fuel Are Shown on This Flow Diagram
All Volumes Shown Are at 14.73 psia &
EL PASO NATURAL GAS COMPANY
SOUTH TEXAS PROJECT
FLOW DIAGRAM-MAXIMUM DAY
UTILIZATION OF SOUTH TEXAS GAS FOR PLANT FUEL
DWG NO. A-3-131



AVERAGE DAY FUEL REQUIREMENTS OF E.P.N.G.'S COMPRESSOR STATIONS LOCATED IN NEW MEXICO AND ARIZONA WHICH WILL UTILIZE GAS PURCHASED FROM LO-VACA GATHERING CO. FOR FUEL

AVERAGE DAY FUEL REQUIREMENTS OF E.P.N.G.'S PLANTS LOCATED IN TEXAS AND EL PASO GAS SUPPLY CO.'S COQUAT STATION AND PHILLIPS GOLDSMITH PLANT WHICH WILL UTILIZE GAS PURCHASED FROM HOUSTON PIPELINE CO. FOR PLANT FUEL

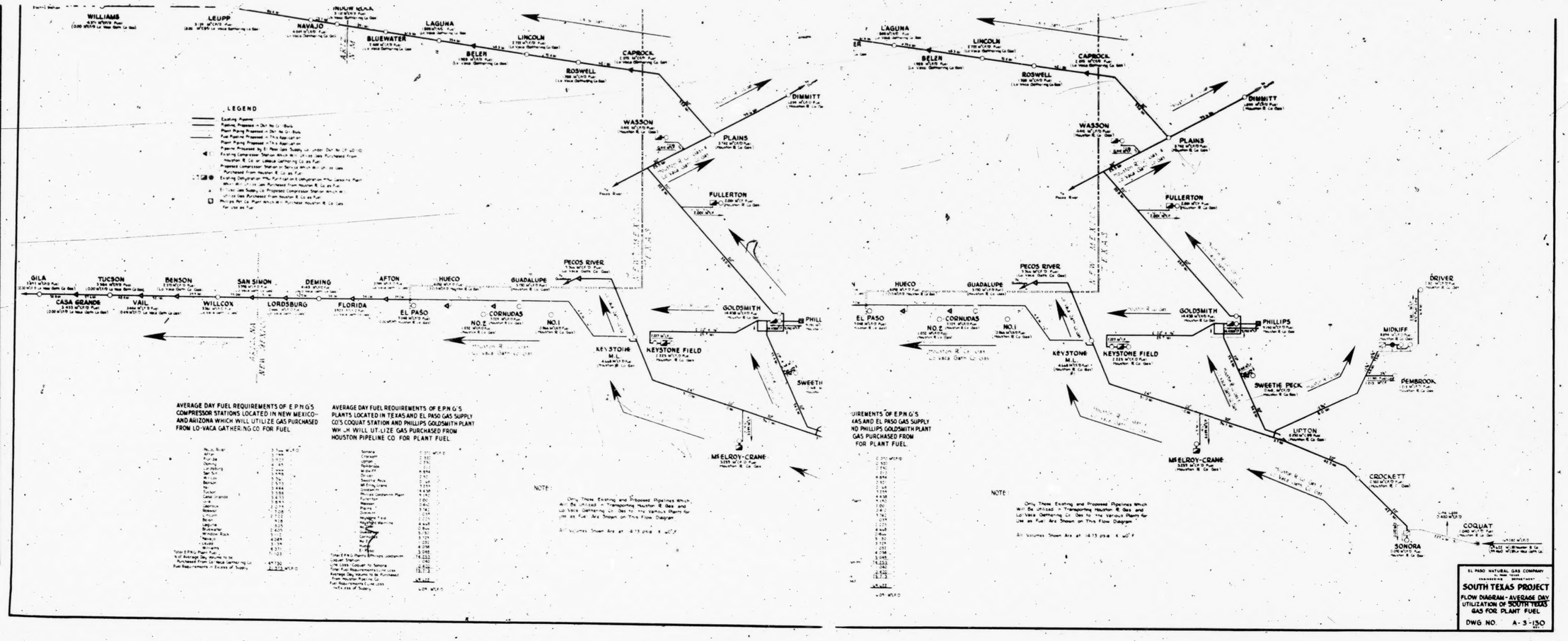


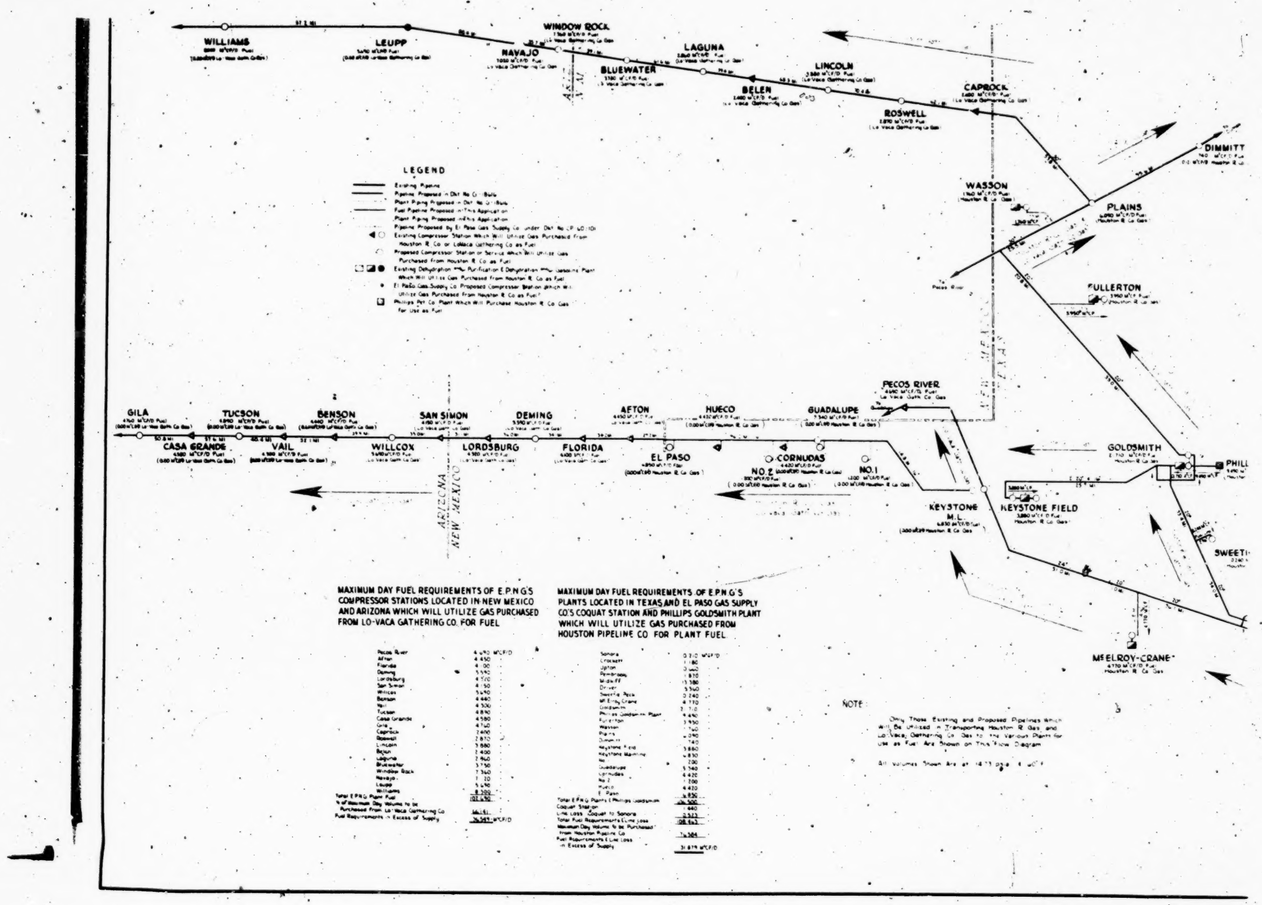
EL PASO NATURAL GAS COMPANY

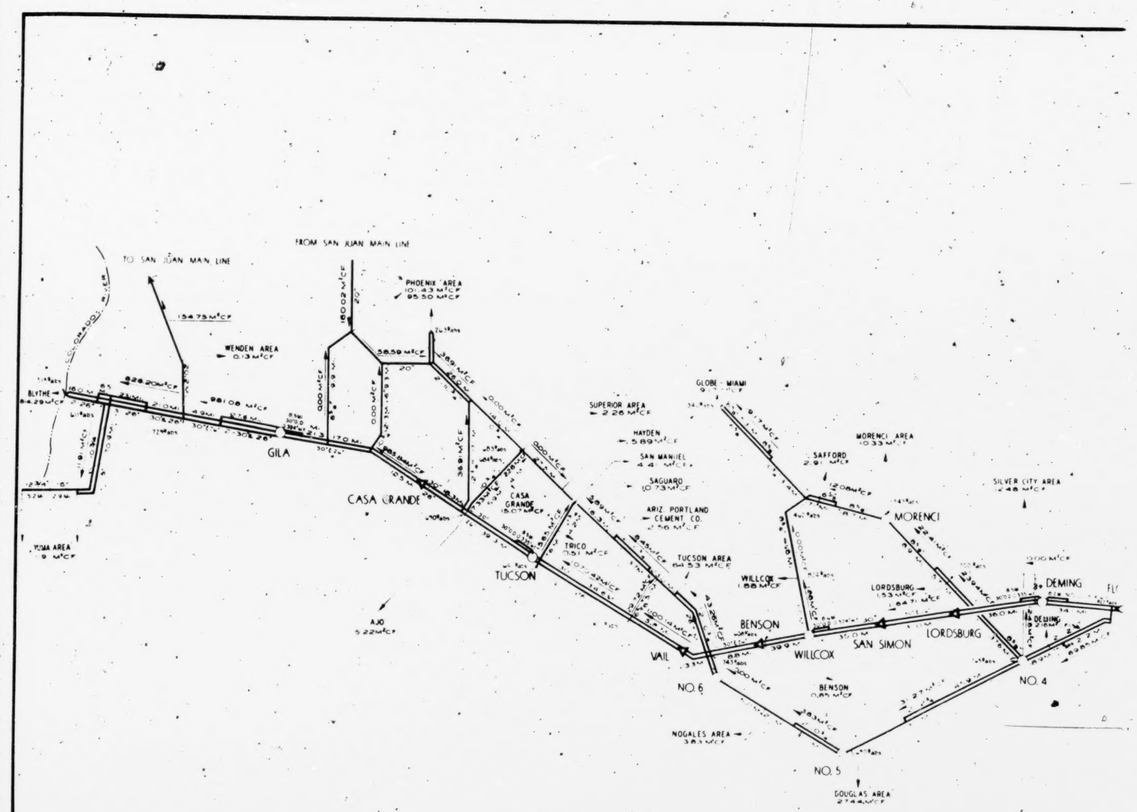
SOUTH TEXAS PROJECT

FLOW DIAGRAM - AVERAGE DAY UTILIZATION OF SOUTH TEXAS GAS FOR PLANT FUEL

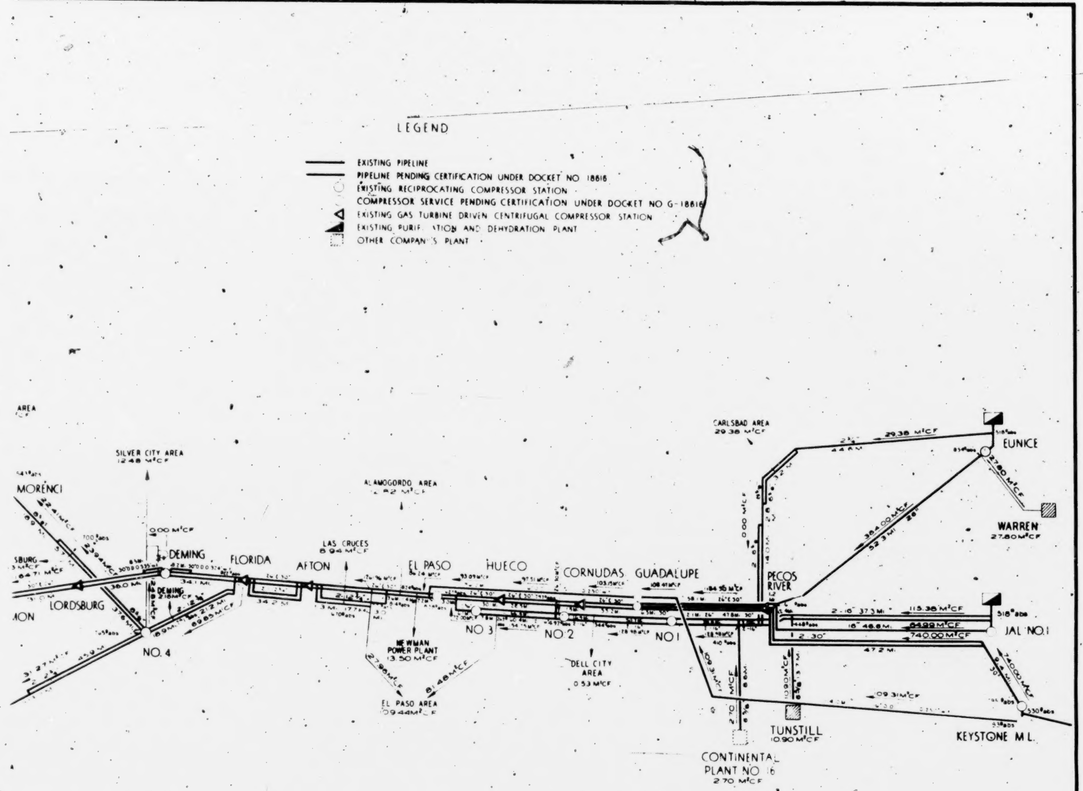
DWG NO. A-3-190


WILLIAMS
LEUPP
NAVAJO
BLUEWATER
LAGUNA
BELEN
LINCOLN
ROSWELL
CAPROCK
DIMMITT
WASSON
PLAINS
FULLERTON
GILA
TUCSON
BENSON
SAN SIMON
DEMING
AFTON
HUECO
GUADALUPE
PECOS RIVER
CASA GRANDE
VAIL
WILLCOX
LORDSBURG
FLORIDA
EL PASO
CORNUDAS
NO. 2
NO. 1
GOLDSMITH
KEYSTONE
KEYSTONE FIELD
PHILLIPS
SWEETIE PECK
DRIVER
MIDKIFF
PEMBROOK
UPTON
CROCKETT
COQUAT
SONORA
McELROY-CRANE
LEGEND
AVERAGE DAY FUEL REQUIREMENTS OF E P N G'S COMPRESSOR STATIONS LOCATED IN NEW MEXICO AND ARIZONA WHICH WILL UTILIZE GAS PURCHASED FROM LO-VACA GATHERING CO. FOR FUEL
AVERAGE DAY FUEL REQUIREMENTS OF E P N G'S PLANTS LOCATED IN TEXAS AND EL PASO GAS SUPPLY CO'S COQUAT STATION AND PHILLIPS GOLDSMITH PLANT WHICH WILL UTILIZE GAS PURCHASED FROM HOUSTON PIPELINE CO. FOR PLANT FUEL
NOTE
Only Those Existing and Proposed Pipelines Which Will Be Utilized in Transporting Houston & Gas and Lo-Vaca Gathering Co. Gas to the Various Plants for Use as Fuel Are Shown on This Flow Diagram
All Volumes Shown Are at 14.73 psia & 60° F
EL PASO NATURAL GAS COMPANY
ENGINEERING DEPARTMENT
SOUTH TEXAS PROJECT
FLOW DIAGRAM - AVERAGE DAY UTILIZATION OF SOUTH TEXAS GAS FOR PLANT FUEL
DWG NO. A-3-130


WILLIAMS
LEUPP
WINDOW ROCK
NAVAJO
BLUEWATER
LAGUNA
BELEN
LINCOLN
CAPROCK
ROSWELL
DIMMITT
WASSON
PLAINS
FULLERTON
PECOS RIVER
GUADALUPE
HUECO
AFTON
DEMING
SAN SIMON
BENSON
TUCSON
GILA
CASA GRANDE
VAIL
WILLCOX
LORDSBURG
FLORIDA
EL PASO
CORNUDAS
NO. 2
NO. 1
KEYSTONE M.L.
KEYSTONE FIELD
GOLDSMITH
MCELROY-CRANE
ARIZONA
NEW MEXICO
LEGEND
Existing Pipeline
Pipeline Proposed - Dkt No. G-
Plant Piping Proposed - Dkt No. G-
Fuel Pipeline Proposed - This Application
Plant Piping Proposed - This Application
Pipeline Proposed by El Paso Gas Supply Co. under Dkt No. CP 60-10
Existing Compressor Station which will utilize Gas Purchased From Houston R. Co. or Lo-Vaca Gathering Co as Fuel
Proposed Compressor Station or Service which will utilize Gas Purchased From Houston R. Co. as Fuel
Existing Dehydration Plant Purification Dehydration Plant which will utilize Gas Purchased From Houston R. Co as Fuel
El Paso Gas Supply Co. Proposed Compressor Station which will utilize Gas Purchased From Houston R. Co as Fuel
Mirages Art Co. Plant which will Purchased Houston R. Co. Gas for use as Fuel
MAXIMUM DAY FUEL REQUIREMENTS OF E.P.N.G.'S COMPRESSOR STATIONS LOCATED IN NEW MEXICO AND ARIZONA WHICH WILL UTILIZE GAS PURCHASED FROM LO-VACA GATHERING CO. FOR FUEL
MAXIMUM DAY FUEL REQUIREMENTS OF E.P.N.G.'S PLANTS LOCATED IN TEXAS AND EL PASO GAS SUPPLY CO.'S COQUAT STATION AND PHILLIPS GOLDSMITH PLANT WHICH WILL UTILIZE GAS PURCHASED FROM HOUSTON PIPELINE CO. FOR PLANT FUEL
NOTE



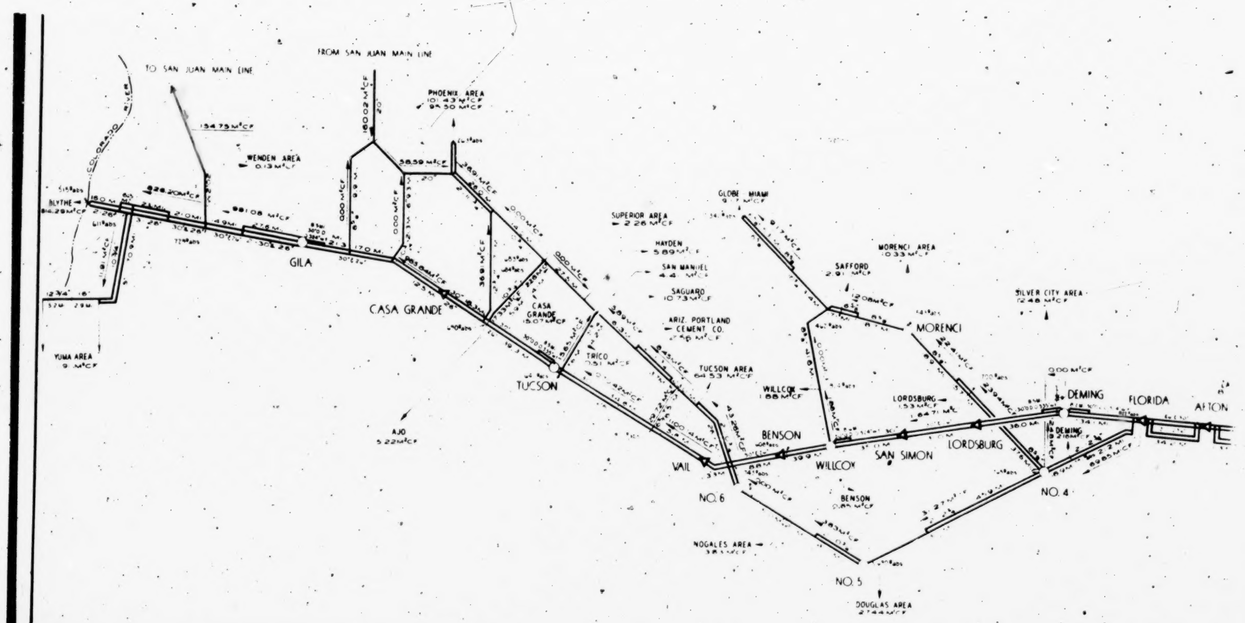
SERVICE	CALIFORNIA MAIN LINE																					EL PASO MAIN						
STATION LOCATION	GILA	CASA GRANDE	TUCSON	VAIL	BENSON	WILLCOX	SAN SIMON	LORDSBURG	DEMING	FLORIDA	AFTON	EL PASO	HUECO	CORNUDAS	GUADALUPE (28.530")	PECOS RIVER	EUNICE	JAL	KEYSTONE (30")	MORENCI	NO. 6	NO. 5	NO. 4	NO. 3	NO. 2	NO. 1
SUCTION PRESSURE psi abs	634	600	635	629	613	622	634	630	634	654	657	599	617	623	662	827	632	593	513	515							
DISCHARGE PRESSURE psi abs	849	830	839	828	805	837	816	818	8.0	827	846	843	807	811	843	1088	837	841	727	800	1188							
RATIO	1346	1383	1322	1317	1313	1346	1288	1299	1293	1264	1288	407	1308	1301	1273	1316	1325	643	417	1553	2307							
SUCTION TEMPERATURE °F	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°							
BHP/MCF AT 14.73 psi & 60° F	17.02	17.14	16.34	14.41	14.28	17.26	13.20	13.67	15.21	12.15	13.7	9.53	14.01	13.76	14.42	16.10	14.81	28.09	9.9	24.85	55.98							
MCF TO COMPRESS AT 14.73 psi & 60° F	981.08	985.84	1049.88	1100.14	1147.70	1154.81	1160.58	1164.7	1169.01	1244.4	1249.1	2100.00	1158.00	1243.10	1243.10	1011.1	1243.10	2240.20	2240.20	864.99	347.00							

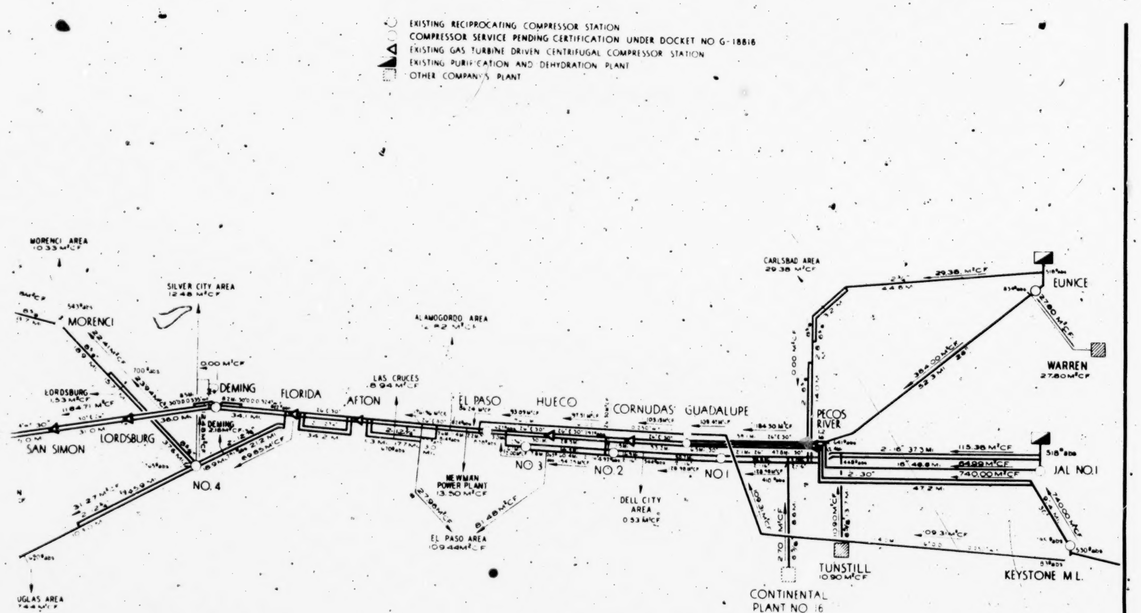


KEYSTONE (30")	EL PASO MAIN LINE						
	MORENCI	NO. 6	NO. 5	NO. 4	NO. 3	NO. 2	NO. 1
515					246	279	345
800 1188	SUPERSION BURIED		SUPERSION BURIED		866	502	487
1553 2307				SUPERSION BURIED	2711	1797	1412
70°					60°	60°	60°

ALL VOLUMES SHOWN ARE AT 14.73 psi & 60° F
AVERAGE HEATING VALUE OF GAS = 969 BTU
GRAVITY OF GAS = 0.650

SOUTHERN SYSTEM
CALIFORNIA MAIN LINE
PIPE LINE EFFICIENCY - FROM DEMING WEST = 90%

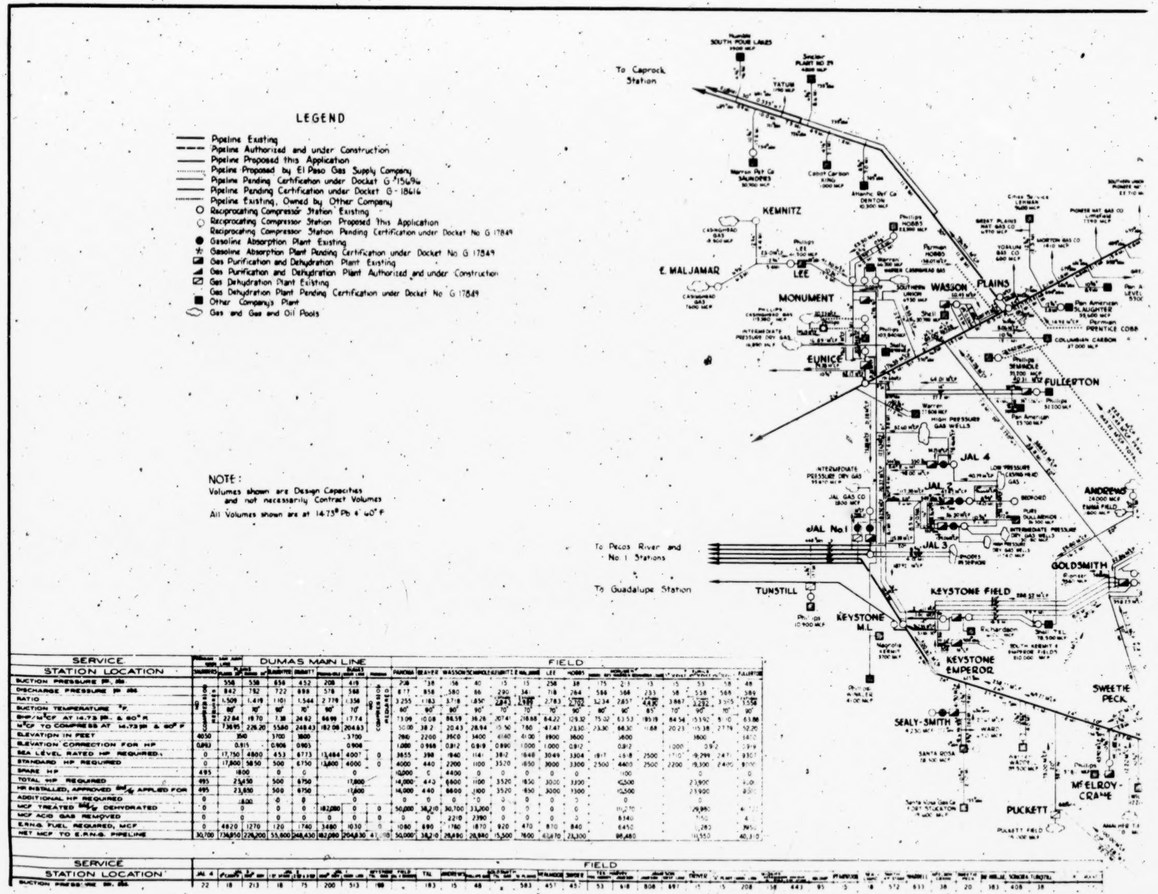


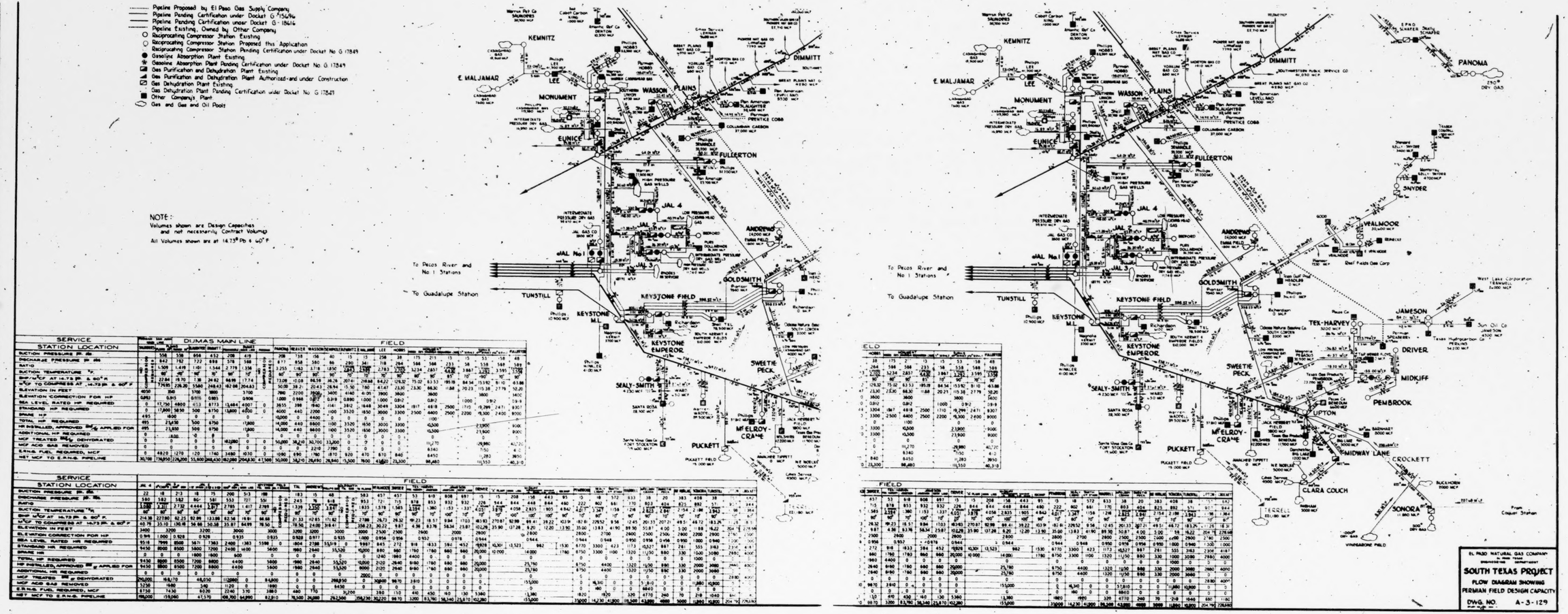


SERVICE	CALIFORNIA MAIN LINE																			EL PASO MAIN LINE							
STATION LOCATION	GILA	CASA GRANDE	TUCSON	VAIL	BENSON	WILLCOX	SAN SIMON	CRNDS.	DEMING	FLORIDA	AFTON	EL PASO	HUECO	CORNUDAS	GUADALUPE PASS	PECOS RIVER	EUNICE	JAL	KEYSTONE 30"	MORENCI	NO. 6	NO. 5	NO. 4	NO. 3	NO. 2	NO. 1	
SUCTION PRESSURE psi abs	634	600	635	629	613	622	634	630	634	654	651	599	617	623	662	827	632	513	513	515				246	279	345	
DISCHARGE PRESSURE psi abs	849	830	839	828	805	837	816	818	820	827	846	843	807	811	843	1088	837	843	727	800	1188			666	502	487	
RATIO	1340	1383	1322	1317	1313	1346	1288	1299	1293	1264	1288	407	1308	1301	1273	1316	1325	1643	1417	1553	2307			2711	1797	1412	
SUCTION TEMPERATURE °F	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°	70°				60°	60°	60°	
BHP/M³CF AT 14.73 psi & 60°F	17.02	17.14	16.34	14.41	14.28	17.28	13.20	13.67	15.21	12.15	13.3	9.53	14.07	13.76	14.42	16.10	14.61	28.08	19.91	24.85	50.98			61.83	32.81	9.34	
M³CF TO COMPRESS AT 14.73 psi & 60°F	981.08	985.84	1049.88	1100.14	1147.70	1154.81	1160.56	1164.71	1189.03	1244.44	1249.5	230.00	1158.00	1164.30	1184.30	1013.3	1164.30	356.20	64.99	740.00	09.31			72.00	128.45	128.98	
BRAKE HP REQUIRED	16,698	16,897	17,155	15,853	16,389	19,933	15,319	15,922	17,781	15,120	16,419	24,222	16,293	16,298	17,078	16,866	17,303	10,002	12,942	18,389	55,73			44,52	42,14	24,92	
ELEVATION IN FEET	840	1285	2076	2952	3540	4460	3880	4227	4456	4098	4232	4030	4355	4380	3900		2900	3600	3000	3000				3000	3000		
ELEVATION CORRECTION FOR HP	1000	0.990	0.974	0.929	0.907	0.877	0.895	0.882	0.877	0.886	0.888	0.894	0.877	0.877	0.849		0.930	0.912	0.935	0.935				0.935	0.935		
SEA LEVEL RATED HP REQUIRED	16,698	17,067	17,612	17,064	18,049	22,728	17,118	18,052	20,275	17,065	18,636	26,870	18,556	18,560	18,967	18,46	18,605	10,967	13,83	19,867	59,80			47,66	45,08	26,65	
STANDARD HP REQUIRED	16,700	17,100	17,600	17,100	18,100	22,720	17,100	18,100	20,900	17,100	18,600	26,900	18,600	18,600	19,600	2000	18,600	11,000	14,00	20,000	60,00			49,46	47,99	27,55	
SPARE HP	1100	0	1100	0	0	1800	0	0	2200	0	0	1100	0	0	4000	0	0	1100	3000	0				4800	4800	3200	
TOTAL HP REQUIRED	17,800	17,100	18,700	17,100	18,100	24,320	17,100	18,100	23,100	17,100	18,600	28,000	18,600	18,600	25,600		18,600	12,00	4400	26,000							
HP PREVIOUSLY INSTALLED OR APPLIED FOR	17,800	17,100	18,700	17,100	18,100	24,320	17,100	18,100	23,100	17,100	18,600	28,000	18,600	18,600	25,600		18,600	12,00	4400	26,000							
ADDITIONAL HP TO INSTALL	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0		0	0	0	0							
MCF FUEL REQUIRED	478.0	478.0	488.0	430.0	444.0	589.0	415.0	432.0	559.0	410.0	445.0	685.0	442.0	442.0	487.0	470	469.0	285.0	37.0	524.0	159.0			127.0	120.0	84.0	
NET MCF TO PIPELINE	981,088	985,840	1,049,880	1,100,140	1,147,700	1,154,810	1,160,560	1,164,710	1,189,030	1,244,440	1,249,500	230,000	1,158,000	1,164,300	1,184,300	1,013,300	1,164,300	356,200	64,990	740,000	109,310	22,410	0	3,830	55,210	72,000	128,450	128,980

NOTE
ALL VOLUMES SHOWN ARE AT 14.73 lb. & 60°F
AVERAGE HEATING VALUE OF GAS = 1069 BTU
GRAVITY OF GAS = 0.650
SOUTHERN SYSTEM
CALIFORNIA MAIN LINE
PIPE LINE EFFICIENCY FROM DEMING TO EAST = 90%
PIPE LINE EFFICIENCY FROM DEMING EAST = 88%
FLOWING TEMPERATURE = 70°F
EL PASO MAIN LINE
PIPE LINE EFFICIENCY = 92%
FLOWING TEMPERATURE = 60°F
PROPOSED KEYSTONE TO EL PASO 16" MAINLINE
PIPE LINE EFFICIENCY 92%
FLOWING TEMPERATURE 70°F

EL PASO NATURAL GAS COMPANY
EL PASO, TEXAS
SOUTH TEXAS PROJECT
FLOW DIAGRAM SHOWING
SOUTHERN SYSTEM DESIGN CAPACITY
DWG NO. A-3-127
STUDY NO. T-3-2180-68


LEGEND
Pipeline Existing
Pipeline Authorized and under Construction
Pipeline Proposed this Application
Pipeline Proposed by El Paso Gas Supply Company
Pipeline Pending Certification under Docket G-7154/96
Pipeline Pending Certification under Docket G-18416
Pipeline Existing, Owned by Other Company
Reciprocating Compressor Station Existing
Reciprocating Compressor Station Proposed This Application
Reciprocating Compressor Station Pending Certification under Docket No G-17849
Gasoline Absorption Plant Existing
Gasoline Absorption Plant Pending Certification under Docket No G-17849
Gas Purification and Dehydration Plant Existing
Gas Purification and Dehydration Plant Authorized and under Construction
Gas Dehydration Plant Existing
Gas Dehydration Plant Pending Certification under Docket No G-17849
Other Company's Plant
Gas and Gas and Oil Pools
NOTE:
Volumes shown are Design Capacities and not necessarily Contract Volumes
All Volumes shown are at 14.73 Psi & 60° F
To Caprock Station
To Pecos River and No. 1 Stations
To Guadalupe Station
KEMNITZ
E. MALJAMAR
MONUMENT
EUNICE
LEE
WASSON
PLAINS
FULLERTON
JAL 4
JAL 3
JAL No. 1
ANDREWS
GOLDSMITH
TUNSTILL
KEYSTONE M.L.
KEYSTONE FIELD
KEYSTONE EMPEROR
SEALY-SMITH
SWEETIE PECK
McELROY-CRANE
PUCKETT
SOUTH POLE LANES
Sinclair PLANT NO. 29
TATUM
Warren Pet Co SALADO(ES)
Calvert Carbon
Amerada Pet Co DENTON
Phillips HOBBS
Pioneer
Warren
Texaco
Amerada
Pan American
Phillips SEMINOLE
Phillips
Warren
Pan American
Phillips
Richardson
Phillips
Warren
Phillips
Richardson
Phillips
Warren
Phillips
Richardson
Phillips
Warren



SERVICE	DUMAS MAIN LINE							FIELD																	
STATION LOCATION								PANOMA	BEAVER	WASSON	SEMINOLE	ZUMWALT	E. MAL JAMAR	LEE	HOBBS										FULLERTON
SUCTION PRESSURE PSI ABS	208	138	156	40	15	15	15	258	38	175	215	15	15	53	158	48									
DISCHARGE PRESSURE PSI ABS	871	858	880	866	880	880	880	880	880	880	880	880	880	880	880	880									
RATIO	3.255	5.162	5.718	21.650	58.667	58.667	58.667	3.410	23.158	5.023	4.093	58.667	58.667	16.615	5.582	18.333									
SUCTION TEMPERATURE °F	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°									
BHP/MCF AT 14.73 PSI & 60°F	22.84	19.70	1.38	24.82	98.98	17.74		73.08	10.08	86.59	16.26	20.74	298.88	84.22	128.32	75.02	83.33	190.98	84.54	153.92	81.10	61.88			
MCF TO COMPRESS AT 14.73 PSI & 60°F	0	77,985	226,210	5560	248,43	162 08	204,63	50.00	38.21	20.43	28.94	15.50	7.80	41.41	23.30	23.30	66.30	1.88	20.23	115.38	27.79	10.20			
ELEVATION IN FEET	4032	3168		3700	3880		3700	2980	2200	3500	3400	4140	4190	3900	3600				3600						
ELEVATION CORRECTION FOR HP	0.893	0.915		0.885			0.906	1.000	0.968	0.877	0.898	0.898	1.000	0.892					0.892			0.919			
SEA LEVEL RATED HP REQUIRED	0	17,750	4800	633	8773	13,444	4007	0	3855	398	7840	4141	3892	1848	3049	3304	1917	4418	2500	1710	19,299	2471	9307		
STANDARD HP REQUIRED	0	17,800	5630	500	8750		13,800	4,000	440	2,000	7,000	3520	1850	3000	3300	2500	6400	2500	2200	19,300	2400	9000			
SPARE HP	495	1800		0	0		0	10,000	0	4400	0	0	0	0	0		1000			1892		0			
TOTAL HP REQUIRED	495	21,650	500	8750		17,800		14,000	440	8800	1100	3520	1850	3000	3300		13,500			23,900		9300			
HP INSTALLED, APPROVED BHP APPLIED FOR	495	21,650	500	8750		17,800		14,000	440	8800	1100	3520	1850	3000	3300		13,500			23,900		9300			
ADDITIONAL HP REQUIRED	0	3,850	0	0		4,000		0	0	2,210	2,790	0	0	0	0		8,340			7,150		4,000			
MCF TREATED BHP DEHYDRATED	0	4820	1270	120	1740	3480	1030	0	1090	780	1870	920	470	870	840		8450			1,282		3650			
MCF ACID GAS REMOVED	0	0	0	0		0		0	0	0	0	0	0	0	0		11,270			29,980		40,220			
E.P.N.G. FUEL REQUIRED, MCF	0	4820	1270	120	1740	3480	1030	0	1090	780	1870	920	470	870	840		8450			1,282		3650			
NET MCF TO E.P.N.G. PIPELINE	30,198	736,850	226,200	55,600	248,430	162,080	204,830	47,500	50,000	38,210	26,890	26,840	15,500	7600	41,600	25,300		98,480		111,550		40,310			

SERVICE	FIELD																								
STATION LOCATION																									
SUCTION PRESSURE PSI ABS	657	53	618	808	697	15	15	208	158	443	93	15	18	572	633	38	20	383	408	38					
SUCTION PRESSURE PSI ABS	715	878	853	932	932	226	844	844	844	844	844	460	222	802	881	170	803	404	823	892	57				
RATIO	1.089	16.547	1.378	1.153	1.337	15.067	5.476	4.058	2.835	1.905	4.842	4.017	3.347	1.358	1.218	4.823	1.454	2.754	2.184	1.343	16.842				
SUCTION TEMPERATURE °F	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°	60°				
BHP/MCF AT 14.73 PSI & 60°F	21.33	102.85	171.62	2788	26.73	29.32	99.23	18.57	9.84	17.03	48.93	270.87	92.98	99.41	39.22	103.91	82.81	29.52	9.56	12.45	201.33	207.21	49.5	46.72	183.25
MCF TO COMPRESS AT 14.73 PSI & 60°F	19.56	24.80	318.41	4.56	8.378	58.34	25.87	104.28	35.90	137.28	8.20	12.00	13.90	35.00	13.83	41.90	89.30	50.84	17.00	4.00	30.00	204.9	27.56	18.32	
ELEVATION IN FEET	3000	3200		3200		3000		3000	3200	3000		3000	2500	2500	2600		2700		2800	2500	2600	2600	2500	2600	2700
ELEVATION CORRECTION FOR HP	0.916	1.000	0.928	0.920		0.935		0.935	0.928	0.977		0.935	1.000	0.956	0.956		0.952		0.978		0.944				
SEA LEVEL RATED HP REQUIRED	15.15	7595	8500	5671	7383	2,400	3,983	5598	404	2788	5539	3,983	3,892	1,848	3,049	3,304	1,917	4,418	2,500	1,710	19,299	2,471	9,307		
STANDARD HP REQUIRED	9450	8000	8500	5800	7200	2400	4400	5600	1980	2640	5520	4000	3880	1860	3060	3300	1920	4400	0	1760	19,300	2,400	9,000		
SPARE HP	0	0		1800	1800									0	1240	1980	4400	0	0	0	0	0	0		
TOTAL HP REQUIRED	9450	8000	8500	7200	8800	4400		5600	1980	2640	5520	4000	3880	1860	4300	5280	6320	4400	0	1760	19,300	2,400	9,000		
HP INSTALLED, APPROVED BHP APPLIED FOR	9450	8000	8500	7200	8800	4400		5600	1980	2640	5520	4000	2120	2640	4300	5280	6320	4400	0	1760	19,300	2,400	9,000		
ADDITIONAL HP REQUIRED	0	0	0	0	0	0	0	0	0	0	0	0	1760	0	0	0	0	0	0	0	0	0	0		
MCF TREATED BHP DEHYDRATED	290,000	168,170		68,050	112,980	0	84,800	0	0	0	288,950	0	30,900	99,170	39,110	0	0	0	0	0	0	0	29,110	0	
MCF ACID GAS REMOVED	5230	1680		340	1120	0	1680	0	0	6430	0	0	0	0	0	0	0	0	0	0	15,000	0	0	0	
E.P.N.G. FUEL REQUIRED, MCF	8730	7430		620	2240	370	3180	480	170	0	3,200	370	310	490	430	540	1,380	1820	320	4770	260	70	218	1640	680
NET MCF TO E.P.N.G. PIPELINE	285,000	159,060		67,570	108,700	64,090	82,810	79,500	24,080	282,500	258,200	30,220	99,170	3200	83,780	58,140	23,470	102,280	13,000	14,230	11,000	99,500	43,880	4000	5000

This System Map tipped into back of
this volume to facilitate binding

812

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Filed June 1, 1960

Docket No. CI-60-693

In the Matter of

LO-VACA GATHERING CO.

Application for Certificate of Public Convenience and Necessity.

* * * * * * * * * * *

813

Comes now, Lo-Vaca Gathering Co. (Lo-Vaca) and makes application, pursuant to the provisions of Section 7 of the Natural Gas Act, as amended, and in accordance with the provisions of Section 154.91 and Sections 157.23-157.28 of the Commission's Regulations under the Natural Gas Act, for a certificate of public convenience and necessity covering the sale of natural gas as follows:

I

The exact legal name of this applicant is Lo-Vaca Gathering Co. It is a corporation organized under the laws of the State of Texas and is authorized to do business in the State of Texas. Its principal place of business is at Corpus Christi, Texas, and the names, titles, and post office addresses of the persons to whom correspondence and communications in regard to this application are to be addressed are:

Jack Ware
Vice President and General Attorney
Lo-Vaca Gathering Co.
Post Office Drawer 521
Corpus Christi, Texas

Bradford Ross
Ross, Marsh & Foster
725-15th Street, N. W.
Washington 5, D. C.

II

By this application, Lo-Vaca seeks certificate authorization for the gathering and delivery of gas for sale to El Paso Natural Gas Company (El Paso). Such gas will be delivered to El Paso at a point in Live Oak County, Texas, and will be gathered in Live Oak, Goliad, Lavaca, and adjacent counties in Texas, pursuant to the terms of agreements between Lo-Vaca and El Paso dated March 15, 1960 and May 16, 1960, copies of which are attached hereto as Exhibits B-1 and B-2.

III

Lo-Vaca requests authorization to do the things and perform the acts under the terms of the contracts attached hereto as Exhibits B-1 and B-2 and made a part of this application, which include the gathering and delivery of an anticipated fifty million (50,000,000) cubic feet of natural gas per day at 14.65 psia to El Paso under the contract dated March 15, 1960, and for the gathering and sale of an additional anticipated fifty

million (50,000,000) cubic feet per day at 14.65 psia to El Paso pursuant to the contract dated May 16, 1960. Said

volumes of gas to be sold to El Paso by Lo-Vaca are purchased from various producers in the counties heretofore mentioned as listed in Exhibit B-3 attached. Lo-Vaca plans to construct facilities to gather the volumes of gas purchased at central points on the leases or in the vicinity of the fields. All gas will be gathered and delivered by Lo-Vaca to the El Paso Gas Supply Company (Transporter) at a point or points in Live Oak County, Texas, as indicated on the map attached as Exhibit A, where title and responsibility for the gas passes to El Paso. Transporter will receive said gas for the account of El Paso.

IV

The route or routes of the gathering facilities, under which such gathering and delivery and sale of natural gas will be accomplished, are shown on the map attached hereto as Exhibit A and made a part of this application. Lo-Vaca proposes to construct a gathering system to connect with numerous reserves of gas and accumulate sufficient volumes for delivery to the interstate pipeline purchaser to meet its obligations under the contracts attached hereto as Exhibits B-1 and B-2.

V

Lo-Vaca does not propose to serve natural gas to any community, either at wholesale or retail, in conjunction with

the deliveries and sale of natural gas contemplated herein, nor does it propose to deliver gas to any mainline industrial customer, except its delivery of gas to El Paso for its own industrial use.

(816)

VI

No major appurtenant property or facilities are to be constructed in conjunction with the gathering and sale of natural gas contemplated herein.

VII

The producers listed in Exhibit B-3 from which Lo-Vaca will purchase gas, and El Paso to whom Lo-Vaca will sell the gas purchased, and Transporter to whom Lo-Vaca will deliver the gas, have informed Lo-Vaca that they have or will in the immediate future file applications for certificates of public convenience and necessity before this Commission for necessary authorizations. Reference is hereby made to the contracts, covering the producer sales to Lo-Vaca, which will be filed by such producers and will set forth the terms and provisions governing Lo-Vaca's purchases of gas.

VIII

Attached hereto, as Exhibit C, are contract summaries containing the essential provisions of Lo-Vaca's contracts for the sale of gas to El Paso.

817

IX

It would be in the public interest, and in the interest of Lo-Vaca and El Paso, for this Commission to omit the intermediate decision procedure with respect to this application. Lo-Vaca hereby waives oral hearing and opportunity for filing exceptions to the decision of the Commission, and respectfully requests that this application be handled under the shortened procedure provided for in Section 1.32 of the Commission's Rules of Practice and Procedure.

X

Pending determination upon this application for a certificate, a temporary certificate is requested under the applicable regulations for the purpose of permitting Lo-Vaca to construct the necessary facilities and provide the additional gas supplies which El Paso seeks.

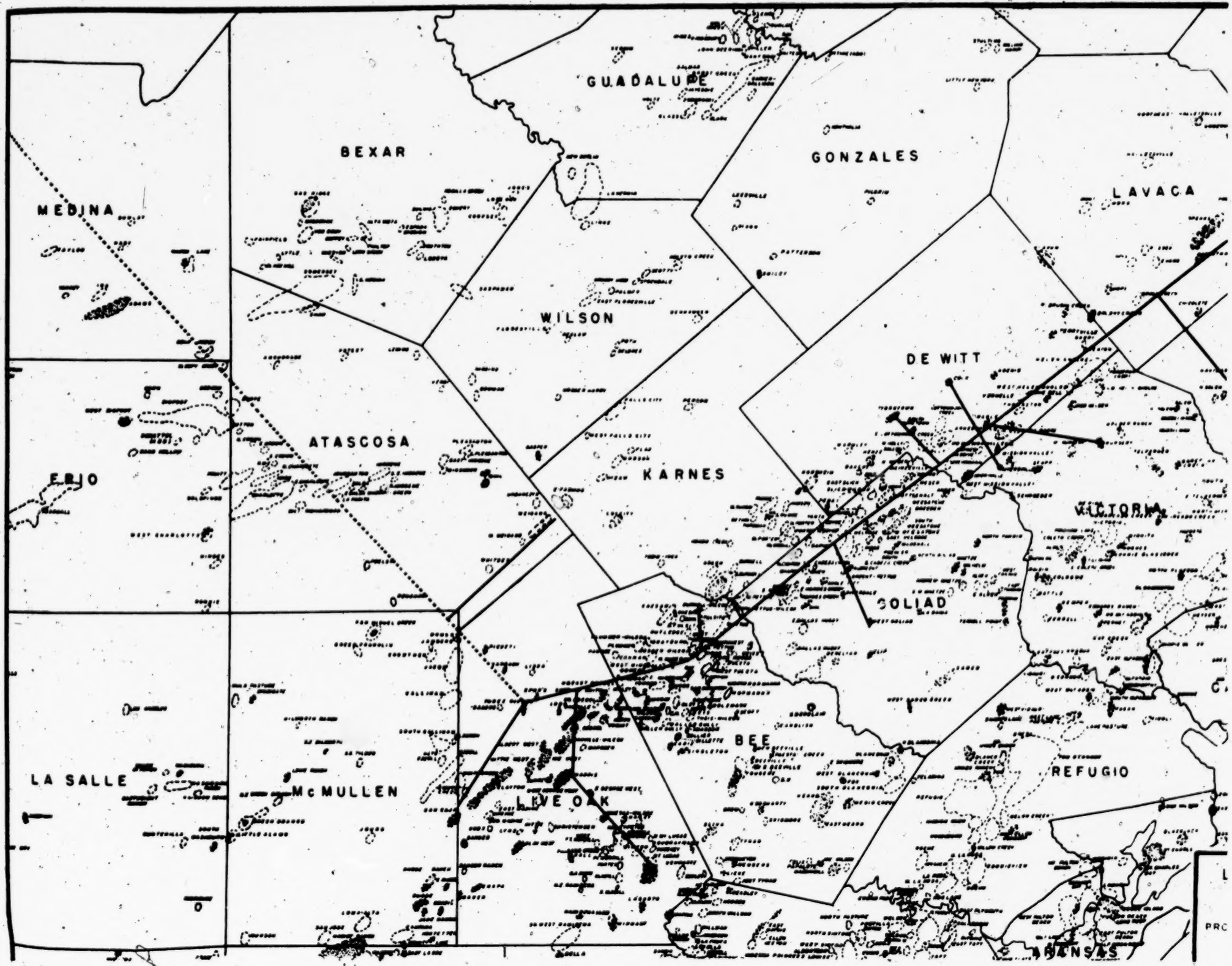
Wherefore, Lo-Vaca Gathering Co. prays that the Federal Power Commission authorize it to gather, deliver, and sell volumes of natural gas to El Paso Natural Gas Company in the manner described herein. Lo-Vaca further prays that the Commission grant the above-requested authorization at the earlies practicable date.

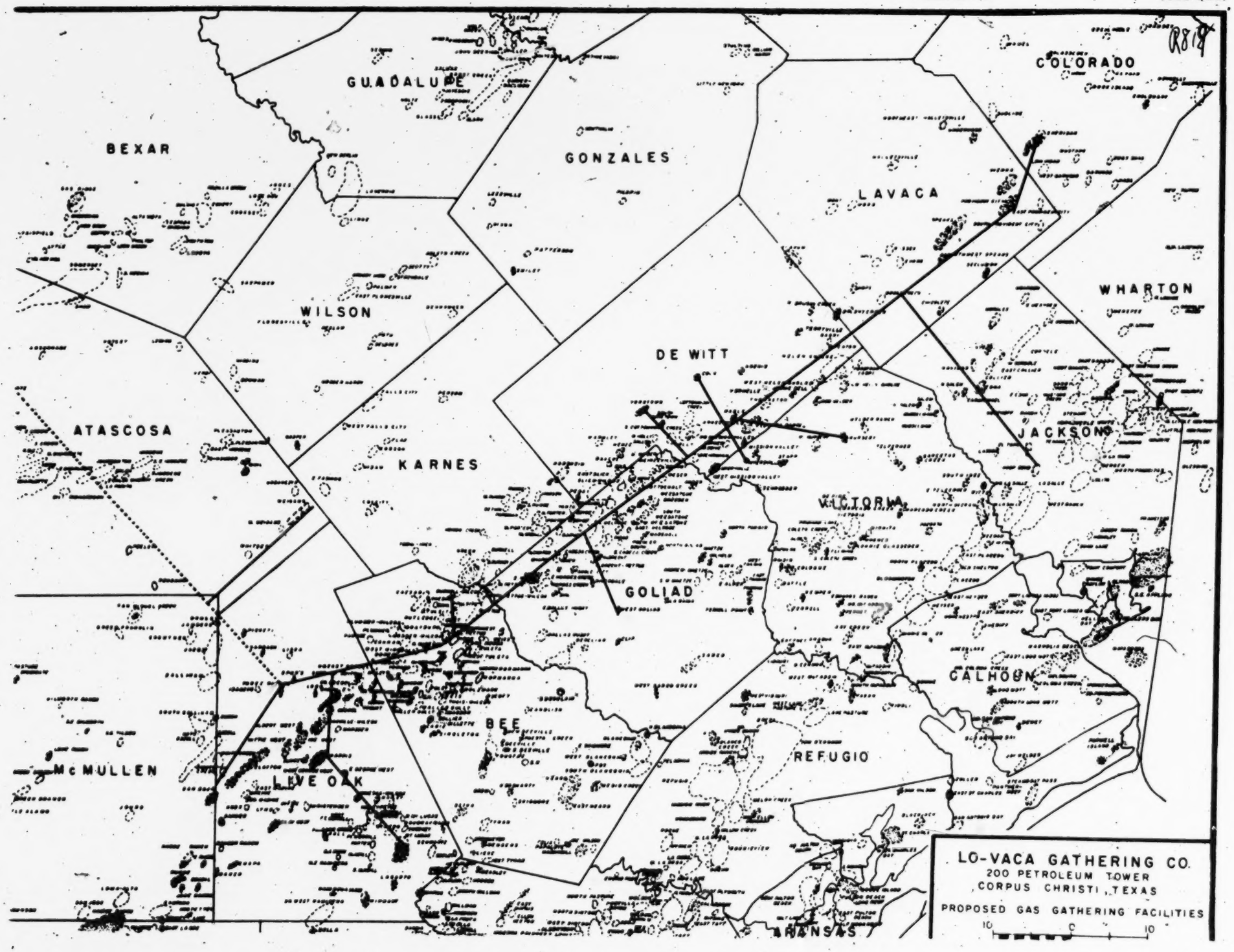
Respectfully submitted,

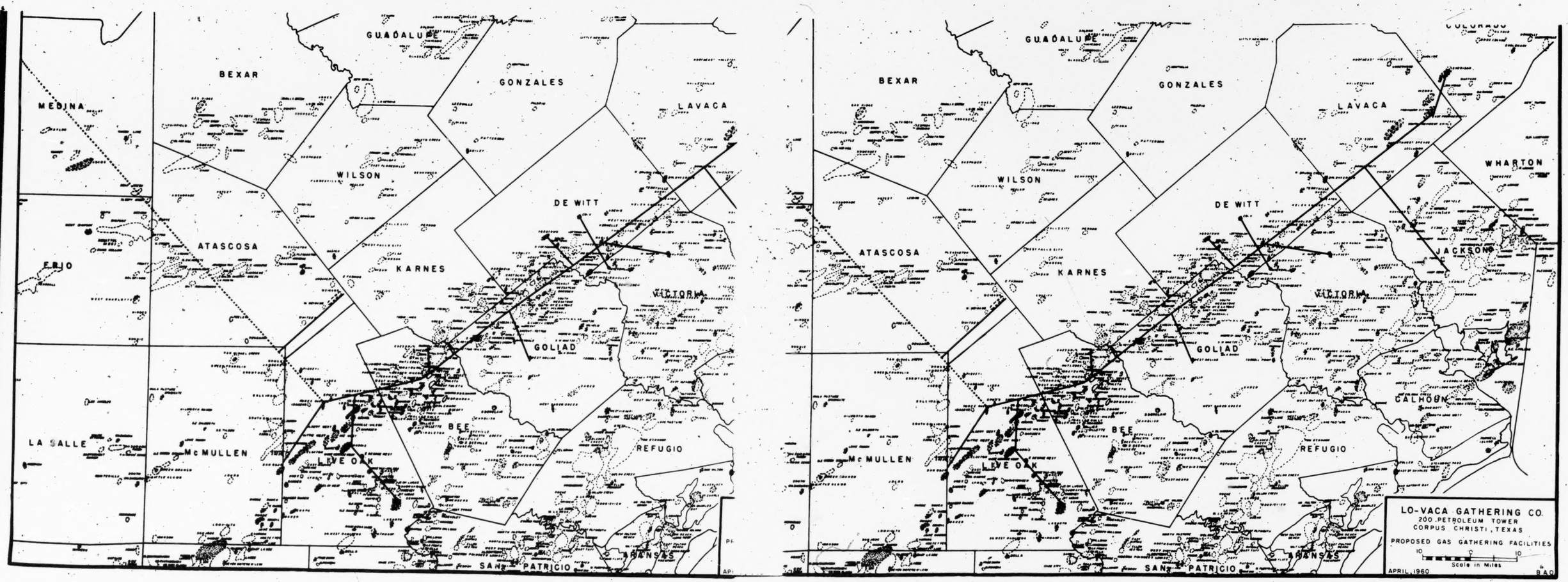
Lo-Vaca Gathering Co.
By /s/ Bradford Ross
Bradford Ross
Its Attorney

Dated at Washington, D. C.
this 1st day of June, 1960.

Exhibit


GUADALUPE
BEXAR
GONZALES
LAVACA
MEDINA
WILSON
DE WITT
ATASCOSA
KARNES
VICTORIA
ERIO
GOLIAD
BEE
LA SALLE
McMULLEN
LIVE OAK
REFUGIO
ARANSAS


818
GUADALUPE
BEXAR
GONZALES
COLORADO
LAVACA
WILSON
WHARTON
DE WITT
ATASCOSA
KARNES
JACKSON
VICTORIA
GOLIAD
CALHOUN
BEE
McMULLEN
LIVE OAK
REFUGIO
ARANSAS
LO-VACA GATHERING CO.
200 PETROLEUM TOWER
CORPUS CHRISTI, TEXAS
PROPOSED GAS GATHERING FACILITIES
10 0 10


GUADALUPE
BEXAR
GONZALES
LAVACA
MEDINA
WILSON
DE WITT
ATASCOSA
KARNES
VICTORIA
GOLLAD
LA SALLE
McMULLEN
BEE
LIVE OAK
REFUGIO
SAN PATRICIO
ARANSAS
WHARTON
JACKSON
CALHOUN
LO-VACA GATHERING CO.
200 PETROLEUM TOWER
CORPUS CHRISTI, TEXAS
PROPOSED GAS GATHERING FACILITIES
10 0 10
Scale in Miles
APRIL, 1960

820

Exhibit B-1

Gas purchase agreement dated March 15, 1960, between El Paso Natural Gas Company, buyer, and Lo-Vaca Gathering Co., seller.

821

GAS PURCHASE AGREEMENT

dated March 15, 1960

between

EL PASO NATURAL GAS COMPANY

Buyer

and

LO-VACA GATHERING CO.

Seller

covering gas produced in South Texas

822

THIS AGREEMENT, made and entered into on this the 15th day of March, 1960, by and between EL PASO NATURAL GAS COMPANY, a Delaware corporation, hereinafter called "El Paso", and LO-VACA GATHERING CO., a Texas corporation hereinafter called "Gatherer",

WITNESSETH:

That in consideration of the mutual covenants and agreements herein contained, the parties hereto agree as follows:

ARTICLE I

Definitions

Section 1. The term "dedicated reserves" as used in this agreement shall mean the natural gas reserves

dedicated by Gatherer to the performance of this agreement as provided in Article II hereof.

Section 2. The term "day" as used in this agreement shall mean a period of twenty-four (24) consecutive hours beginning and ending at seven (7:00) o'clock A.M.

Section 3. The term "month" as used in this agreement shall mean the period beginning at seven (7:00) o'clock A.M. on the first day of a calendar month and ending at seven (7:00) o'clock A.M. on the first day of the next succeeding calendar month.

Section 4. The term "year" as used in this agreement, except as used in Articles X and XIII, shall mean the period beginning at seven (7:00) o'clock A.M. on the first day of a

calendar year and ending at seven (7:00) o'clock A.M. on the first day of the next succeeding calendar year; provided, however, that the period from the date of first deliveries of gas hereunder, or from the date such deliveries are required to begin, as the case may be, until the first day of the next succeeding calendar year shall be deemed to be a year, and the period from seven (7:00) o'clock A.M. on the first day of the last calendar year during the term of this agreement until seven (7:00) o'clock A.M. on the day next succeeding the day when this agreement terminates shall be demed to be a year.

Article II

Dedication

Section 1. On or before May 1, 1960, Gatherer shall dedicate to the performance of this agreement natural gas reserves in the Texas Gulf Coast area having an aggregate initial volume equal to or exceeding four hundred (400)

billion cubic feet. Dedication of a reserve of natural gas to the performance of this agreement shall occur when Gatherer shall submit to El Paso in writing (a) an accurate description of such natural gas reserve, (b) copies of the contract or other instrument evidencing Gatherer's prior right to withdraw the gas in such reserve and sell and deliver the same to El Paso under this agreement, and (c) a statement executed by Gatherer to the effect that such reserve is dedicated to the performance of this agreement. The aggregate initial volume of the dedicated reserves shall be determined, and redetermined from time to time, as provided in Article XIV of this agreement.

823

If the initial determination of the aggregate initial volume of the dedicated reserves shall disclose that such volume is less than four hundred (400) billion cubic feet, Gatherer shall forthwith obtain and dedicate to the performance of this agreement such additional quantity of gas reserves as may be necessary to cause the aggregate initial volume of the dedicated reserves to equal or exceed four hundred (400) billion cubic feet. If, however, after the initial determination any redetermination of the aggregate initial volume of the dedicated reserves shall disclose that such volume is less than four hundred (400) billion cubic feet, Gatherer shall be obligated only to exercise its best efforts to obtain without economic loss and under reasonable terms and conditions and dedicate to the performance of this agreement such additional quantity of gas reserves as may be necessary to cause the aggregate initial volume of the dedicated reserves to equal or exceed four hundred (400) billion cubic feet.

Section 2. Withdrawals of gas from the dedicated reserves during any month must not exceed deliveries made by Gatherer to El Paso during such month under the pro-

visions of this agreement. By written agreement between Gatherer and El Paso dedicated reserves may be released from this agreement if other gas reserves satisfactory to El Paso are substituted in lieu thereof, in which case such other gas reserves shall become dedicated reserves hereunder.

824

ARTICLE III

Governmental Authority

Section 1. El Paso and Gatherer shall, as soon as possible and in any event not later than June 1, 1960, make such applications and filings to and with the Federal Power Commission as may be required on the part of each such respective party in order to procure such Certificate of Public Convenience and Necessity as is necessary for the construction, ownership and operation by such party of the facilities necessary for it to effect delivery or receipt of gas hereunder or otherwise necessary for such party to perform its obligations under this agreement. Each party making such applications shall prosecute the same with diligence to final disposition by the Federal Power Commission and shall promptly notify the other party in writing of the final action taken thereon by the Federal Power Commission.

Section 2. If any Certificate of Public Convenience and Necessity referred to in Section 1 of this article shall be denied, this agreement shall thereupon terminate, and neither party hereto shall thereafter have any liability under this agreement to the other.

Section 3. If any Certificate of Public Convenience and Necessity referred to in Section 1 of this article shall be issued in form and substance unreasonably burdensome to the party receiving the same, such party shall have the

right, at its option, to cancel this agreement by giving the other party written notice of such cancellation within thirty (30) days after the final order issuing

825

such certificate. In case any such notice is given, this agreement shall terminate upon the giving of such notice, and neither party shall thereafter have any liability under this agreement to the other. Acceptance by either party of emergency or temporary Certificates of Public Convenience and Necessity, even though the party accepting the same shall act thereunder, shall not, within the meaning of this article, constitute receipt of a Certificate of Public Convenience and Necessity in form and substance satisfactory to such party unless such party shall notify the other party in writing that it waives all objections to the form or nature of the same.

Section 4. When the Certificates of Public Convenience and Necessity contemplated in this article have been issued and accepted by the respective parties receiving the same, each of such parties shall promptly commence, and thereafter prosecute to completion, the design, acquisition of materials and rights-of-way for and construction of the facilities necessary for it to perform its obligations under this agreement.

ARTICLE IV

Quantity

Section 1. Commencing as of the earlier of:

(a) The date of completion of all of the facilities referred to in Section 4 of Article III of this agreement, or

(b) July 1, 1961, or such later date as Gatherer shall complete its said facilities and stand ready to

826

deliver gas to El Paso under this agreement, Gatherer shall sell and deliver to El Paso from the dedicated reserves, and El Paso shall receive from Gatherer from the dedicated reserves and pay for, or pay for whether or not received, during each year, subject to the provisions of Section 2 of this Article IV, a minimum quantity of natural gas per day determined as provided in Article XIV of this agreement. Such minimum quantity shall be averaged over each year. In addition, El Paso shall have the right to purchase and receive from Gatherer such additional quantity of gas from the dedicated reserves as El Paso may desire, and Gatherer shall sell and deliver the same to El Paso; provided, however, that Gatherer shall not be obligated during any day to sell and deliver to El Paso under the terms of this agreement more than one hundred thirty three percent (133%) of the minimum daily quantity of gas as last determined pursuant to the provisions of Article XIV of this agreement.

Section 2. Should El Paso fail to purchase and receive from Gatherer during any year the minimum quantity of gas which El Paso was required to purchase and receive from Gatherer during such year pursuant to the provisons of this Article IV, which failure was not due to physical nonavailability of gas, causes within the control of Gatherer, regulation by governmental authority or force majeure intervention, then within thirty (30) days after the end of such year El Paso shall pay Gatherer for that quantity of gas (called "unreceived quantity" in this section) which represents the difference between the minimum quantity of gas which

827

El Paso was required hereunder to purchase and receive from Gatherer during such year and the quantity of gas

actually purchased and received by El Paso from Gatherer hereunder during such year. Payment shall be made at the weighted average price paid by El Paso hereunder for gas during such year. If in any year El Paso fails to purchase and receive from Gatherer during such year the minimum quantity of gas which El Paso was required to purchase and receive from Gatherer during such year pursuant to the provisions of this Article IV, El Paso shall have the right at any time during the next four (4) succeeding years to take and receive the quantity of gas (called "make up gas" in this section) which it paid for but did not receive during the year when such deficiency occurred; provided, however, that (a) the quantity of gas so taken by El Paso shall not be treated as a part of the minimum quantity of gas which El Paso is obligated to purchase and receive hereunder during any of such succeeding years and (b) the provisions of this section shall not operate to increase the maximum daily quantity of gas which Gatherer is obligated to deliver to El Paso hereunder, and (c) the provisions of this section shall not operate to extend the term of this agrement. El Paso shall not be required to pay Gatherer for make up gas unless at the time such make up gas is received the price in effect under this agreement is higher than the price paid by El Paso for the corresponding unreceived gas, in which case El Paso shall pay Gatherer for the make up gas a price per one thousand (1,000) cubic feet equal to the difference between the price per one thousand (1,000) cubic feet then in effect

under this agreement and the price per one thousand (1,000) cubic feet paid for the unreceived gas.

Section 3. In the event that on any day the deliveries of gas by Gatherer to El Paso hereunder are, (1) by reason

of physical nonavailability of gas, (2) causes within the control of Gatherer, (3) regulation by governmental authority or, (4) force majeure intervention, less than one hundred thirty three percent (133%) of the minimum daily quantity then in effect hereunder, then in determining for the purposes of Section 2 of this article the average daily volume of gas taken by El Paso hereunder during the year in which such day occurs, there shall be taken, in lieu of the volume of gas (if any) actually delivered by Gatherer to El Paso during such day, a volume of gas equal to one hundred thirty three percent (133%) of the minimum daily quantity then in effect hereunder, or the quantity of gas El Paso desired to take, whichever is the lesser.

Section 4. In addition to the quantities herein provided, in the event Gatherer from time to time has excess gas available, Gatherer may, upon its option, offer to sell and deliver such gas to El Paso and El Paso, upon its option, may receive such excess gas and same shall be deemed delivered under this contract and shall be paid for at the applicable price as provided in Article X.

Article V

Quality

All gas delivered by Gatherer to El Paso under the terms of this agreement shall be natural gas and shall conform to the following specifications (determination as to conformity of the gas with these specifications shall be made in accordance with the generally accepted procedures of the industry):

(a) *Liquids:* The gas shall be free from hydrocarbons and water in liquid form at the temperature and pressure at which delivered.

(b) *Hydrogen Sulphide:* The gas shall not contain more than one (1) grain of hydrogen sulphide per one hundred (100) cubic feet.

(c) *Organic Sulphur:* The gas shall not contain more than twenty (20) grains of organic sulphur (mercaptans) per one hundred (100) cubic feet.

(d) *Carbon Dioxide:* The gas shall not have a carbon dioxide content in excess of two per cent (2%) by volume.

(e) *Dust, Gums, etc.:* The gas shall be commercially free of dust, gums and other solid matter.

(f) *Heating Value:* The total gross heating value of the gas delivered hereunder shall not be less than one thousand (1,000) British thermal units per cubic foot.

Article VI

Delivery Point and Pressure

Section 1. The point of delivery for all gas to be sold and delivered hereunder shall be a point in the immediate vicinity of Three Rivers, Texas, to be selected by agreement between El Paso and Gatherer and such other point or points as may be mutually agreed on by the parties hereto.

Section 2. Title to and ownership of the gas delivered hereunder shall pass to and vest in El Paso at the point of delivery. Gatherer shall be solely liable and responsible for said gas prior to the time of delivery thereof to El Paso, and El Paso shall be solely liable and responsible therefor thereafter.

Section 3. Gatherer shall deliver the gas to El Paso at the delivery point at such varying pressures as El Paso may require; provided, however, that Gatherer shall not be obligated

to deliver the gas at a pressure in excess of five hundred fifty pounds (550#) per square inch gauge.

ARTICLE VII

Meters

Section 1. El Paso, at its sole cost and expense, shall install, maintain and operate at the delivery point a standard type orifice meter or meters for the measuring of the quantity of gas delivered hereunder. Orifice meters shall be installed and operated in accordance with the specifications prescribed in Gas Measurement Committee Report No. 3, dated April, 1955, of the Natural Gas Department of the American Gas Association. El Paso shall cause the charts on such meters to be changed each day. The respective meter, meter readings and meter charts shall be accessible at all reasonable times to inspection and examination by Gatherer.

Section 2. From time to time and at least once in each three (3) months, the accuracy of El Paso's measuring equipment shall be verified by and at the expense of El Paso. If either party at any time shall notify the other that it desires a special test of any meter, the other party shall cooperate to secure an immediate verification of the accuracy of such meter and joint observation of any adjustments. If any such test shall be requested by Gatherer, and upon such test, the measuring equipment shall be found to be registering correctly, the cost of such test shall be charged to Gatherer, otherwise the cost of all such tests shall be borne by El Paso. El Paso shall give notice to Gatherer of the time of all tests in order that Gatherer may

831

conveniently have its representative present. Reading, calibration and adjustment of El Paso's meters and changing of charts shall be done only by El Paso.

Section 3. If, upon any test, the percentage of inaccuracy shall be two per cent (2%) or more, the registration of such meter shall be corrected at the rate of such inaccuracy for any period which is definitely known or agreed upon, but in case the period is not definitely known or agreed upon, then for a period extending back one-half (½) of the time elapsed since the date of the last calibration. Following any test, metering equipment found inaccurate shall be immediately restored by El Paso as closely as possible to a condition of accuracy. If, for any reason, any meter is out of service or out of repair so that the amount of gas delivered cannot be estimated or computed from the reading thereof, the amount of gas delivered through the period such meter is out of service or out of repair shall be estimated and agreed upon by the parties hereto upon the basis of the best data available using the first of the following methods which is feasible:

a. By correcting the error if the percentage of error is ascertainable by calibration test or mathematical calculation.

b. By using the registration of Gatherer's check meter if installed and accurately registering.

c. By estimating the quantity of deliveries during preceding periods under similar conditions when the meter was registering accurately.

832

Section 4. Gatherer may, at its option and expense, install and operate a check meter to check El Paso's meter, but measurement of gas for the purpose of this agreement

shall be by El Paso's meter, except as hereinabove specifically provided to the contrary. Such check meter and equipment shall be so installed as not to interfere with the operation of the meter or meters to be installed and maintained by El Paso at or near the point of delivery, as provided for in Section 1 of this Article VII.

ARTICLE VIII

Unit of Volume

Section 1. The unit of volume for all purposes hereunder (except for computation of "quality" values under the provisions of Article V) shall be one (1) cubic foot at an absolute pressure of fourteen and sixty-five hundredths pounds (14.65#) per square inch at a temperature of sixty (60) degrees Fahrenheit.

Section 2. The unit of volume for the determination of heating value under subparagraph (f) of Article V hereof shall be the amount of gas, saturated with water vapor, which would occupy a volume of one (1) cubic foot at a temperature of sixty (60) degrees Fahrenheit and under a pressure equivalent to thirty (30) inches of mercury at thirty-two (32) degrees Fahrenheit.

Section 3. The unit of volume for determination of quality values under subparagraphs (b) and (c) of Article V hereof shall be one (1) cubic foot at a temperature of sixty (60) degrees Fahrenheit and under a pressure equivalent to thirty (30) inches of mercury at thirty-two (32) degrees Fahrenheit.

ARTICLE IX

Measurement

Section 1. All measurement of gas hereunder shall be in accordance with the recommendations for measuring

gas contained in Report No. 3 of the Gas Measurement Committee of the American Gas Association, dated April, 1955, applied in a practical and appropriate manner, and correction shall be made for deviation from Boyle's Law.

Section 2. The temperature of the gas flowing through the meter or meters to be installed and maintained by El Paso at the delivery point or points shall be determined by the use of a recording thermometer of standard manufacture installed by El Paso so that it may properly record such temperature. The arithmetical average of the twenty-four (24) hour record, or of that portion of the twenty-four (24) hours during which gas was passing, if gas had not been passing during the entire period, from the recording thermometer shall be taken to be the gas temperature for the day and shall be used to make proper corrections in volume computations.

Section 3. The specific gravity of the gas delivered hereunder shall be determined by the use of a recording gravitometer to be installed, maintained and operated by El Paso at each delivery point. The arithmetical average of the hourly specific gravity during each twenty-four (24) hour period, or during that period which gas was actually passing, shall be used to make proper computations.

Section 4. The gross heating value of the gas shall be determined by El Paso at intervals of three (3) months or by means of a recording calorimeter of the Thomas type, at the option of El Paso.

Article X

Price

Section 1. The price to be paid by El Paso to Gatherer per one thousand (1,000) cubic feet for all natural gas sold hereunder shall be as follows:

(834)

(a) For the four (4) year period commencing on the date specified in Section 1 of Article IV of this agreement, twenty-two cents (22¢).

(b) For the next four (4) year period, twenty-three cents (23¢).

(c) For the next four (4) year period, twenty-four cents (24¢).

(d) For the next four (4) year period, twenty-five cents (25¢).

(e) For the next four (4) year period, twenty-six cents (26¢).

Section 2. It is the intent and understanding of the parties hereto that the sale of natural gas hereof is not subject to the jurisdiction of the Federal Power Commission because this sale is not for resale. If this sale should become subject to the jurisdiction of the Commission and the Commission should at any time order a reduction in the contract prices herein, then El Paso

835

agrees that Gatherer may subsequently, at its option, file for such higher price as Gatherer may feel is justified, providing for but not exceeding the revenues to which Gatherer is entitled as provided in this Article X hereof.

ARTICLE XI

Billing and Payment

Section 1. On or before the tenth (10th) day of each calendar month, El Paso shall render to Gatherer a statement showing the amount of gas purchased by El Paso hereunder during the preceding calendar month, and payment for such gas shall be made by El Paso to Gatherer

on or before the twenty-fifth (25th) day of the calendar month in which such statement is rendered. Any errors in such statement or payment shall be promptly reported to El Paso, and El Paso shall make proper adjustment thereof within thirty (30) days after final determination of the correct volume or values involved; provided, however, that if no such errors are reported to El Paso within one (1) year from the date such statement or payment was submitted to Gatherer, the same shall be conclusively deemed to be correct.

Section 2. Upon request, El Paso shall furnish Gatherer the measurement charts applicable to any monthly statement. Gatherer shall return to El Paso all such charts within thirty (30) days after receipt, and Gatherer shall have access to El Paso's records and books at all reasonable hours so far as they pertain to the gas sold hereunder.

836

ARTICLE XII

Taxes

Section 1. Subject to the other provisions of this article, Gatherer shall pay or cause to be paid all taxes and assessments imposed on Gatherer with respect to the gas delivered hereunder prior to its delivery to El Paso, and El Paso shall pay or cause to be paid all taxes and assessments imposed upon El Paso with respect to the gas delivered hereunder after its receipt by El Paso. Neither party shall be responsible or liable for any taxes or other statutory charges levied or assessed against any of the facilities of the other party used for the purpose of carrying out the provisions of this agreement.

Section 2. Any sales, transaction, occupation, service, production, severance, gathering, transmission, export or excise tax, assessment or fee levied, assessed or fixed by

(836)

the United States, the State of Texas, or other governmental authority and taxes of a similar nature, or equivalent in effect (not including income, excess profits, capital stock, franchise or general property taxes) in respect of or applicable to the gas delivered hereunder to El Paso in addition to or greater than those, if any, being levied, assessed or fixed on the date of this agreement in respect of or applicable to such gas and which Gatherer may be liable for, either directly or indirectly, or through any obligation to reimburse others, are hereinafter collectively referred to as an "additional tax" provided, however, that all existing taxes, up to the present respective rates thereof, now imposed on the parties hereto shall

837

not be considered as an additional tax. It is expressly understood and agreed between the parties hereto that El Paso shall, subject to the conditions hereinafter set forth, pay to Gatherer three-fourths (3/4ths) of any such additional tax. Should Gatherer so become liable for any such additional tax, Gatherer shall notify El Paso immediately. Within ninety (90) days after the end of each calendar month, Gatherer shall prepare and submit to El Paso a statement setting forth the amount of any such additional tax that Gatherer has paid during such calendar month, and within thirty (30) days after submission of such statement, adjustment between the parties hereto shall be made by El Paso reimbursing Gatherer to the extent of three-fourths (3/4ths) of the amount of any such additional tax which Gatherer shall have so paid. The tax reimbursement herein provided for shall apply to the total amount of money Gatherer is required to pay by virtue of any such additional tax but shall not apply to any delinquent interest or penalty payments that may

be applicable to any such additional tax. Taxes applicable to any royalty, overriding royalty, production payment or similar interest shall be considered to be covered by the provisions of this Section 2 only if the reimbursement made by El Paso to Gatherer with respect thereto is passed on by Gatherer to the owner of such royalty, overriding royalty, production payment or similar interest.

ARTICLE XIII

Term

Subject to the other provisions of this agrement, this agreement shall be effective from the date hereof and shall continue

in force for a term of twenty (20) years from the date specified in Section 1 of Article IV of this agreement.

ARTICLE XIV

Gas Reserves

Section 1. As soon as may be reasonably practical El Paso and Gatherer shall conduct a joint study of the dedicated reserves to determine the quantity of recoverable gas contained therein. Upon demand of either party a similar study shall be conducted from time to time thereafter but not more often than once each two (2) years. Each such study shall give proper consideration to development, operating conditions, producing conditions, applicable orders, rules and regulations of regulatory authorities, and other relevant factors and shall determine as nearly as can be determined the quantity of gas then remaining on the date of such study which can thereafter be produced for delivery to El Paso under the provisions of this agreement. To the quantities so determined by the last such study shall be added the quantity

(838)

of gas theretofore delivered to El Paso under this agreement. The quantity of gas arrived at by such addition is called the "aggregate initial volume" of the dedicated reserves in this article and in Article II of this agreement. For all purposes the volume of recoverable gas in the dedicated reserves shall be determined by calculations based on a terminal bottom hole pressure of five hundred pounds (500#) per square inch absolute or such lower pressure as El Paso and Gatherer may agree upon at the time of each dedication.

839

Section 2. The number of billions of cubic feet of gas found by the last reserve study to constitute the aggregate initial volume of the dedicated reserves shall be divided by eight (8) and the quotient so obtained shall be multiplied by one million (1,000,000). The product of such multiplication shall be the number of cubic feet of gas which shall be the minimum daily quantity of gas, averaged over each year, which El Paso shall be obligated to purchase under the provisions of this agreement; provided, however, that such minimum daily quantity shall not exceed fifty million (50,000,000) cubic feet of gas; and, provided further, that if the aggregate initial volume of the dedicated reserves shall ever exceed four hundred (400) billion cubic feet, Gatherer shall have the right to deliver the excess over four hundred (400) billion cubic feet to others, subject to the conditions that: (a) such deliveries shall not interfere in any way with deliveries of gas to El Paso under this agreement and (b) the quantity of gas which can be so delivered to others shall be redetermined, and may be increased or decreased, at the time of each subsequent reserve study.

Section 3. If El Paso and Gatherer shall disagree as to any fact or facts to be determined by any joint study

mentioned in this article the same shall be determined by arbitration in the following manner:

El Paso shall appoint one competent geologist or reservoir engineer and Gatherer shall appoint one competent geologist or reservoir engineer and the two so appointed shall select a third competent geologist or reservoir engineer. If either El Paso or

Gatherer shall fail to appoint a geologist or reservoir engineer within ten (10) days after a request for such appointment is made by the other party in writing, or if the two geologists or reservoir engineers so appointed shall fail within ten (10) days after the appointment of the second of them to agree on a third geologist or reservoir engineer, the geologist or reservoir engineer necessary to complete a board of three geologists or reservoir engineers shall be appointed upon application by either party therefor by the United States District Judge, senior in point of service, of a Federal Judicial District in which some part of the property covered by this agreement is situated. In the event such judge shall fail or refuse to act, then either party hereto may request the American Arbitration Association to select the geologist or reservoir engineer to complete the board of three. After three geologists or reservoir engineers are appointed pursuant to the foregoing provisions of this article they shall meet, hear the parties with respect to the matter of said fact or facts, and arrive at a determination of said fact or facts. Any determination agreed to in writing by at least two of said geologists or reservoir engineers shall be final and binding on the parties hereto. All geologists or reservoir engineers appointed pursuant to this article shall be individuals experienced in the oil and gas industry and competent to pass on the matter of said

(840)

fact or facts. The fees and expenses of the geologists or reservoir engineers shall be borne equally by the parties hereto.

841

Section 4. Gatherer shall, from time to time, at El Paso's request, furnish to El Paso such geological, engineering and production data as may be available to Gatherer and as may be desired by El Paso for a study of the dedicated reserves and the deliverability thereof and which will enable El Paso to make and maintain currently its own reserve and deliverability studies.

ARTICLE XV

Title

Gatherer hereby warrants title to the gas sold by it hereunder and its right to sell the same and warrants that all such gas is owned by Gatherer free from all liens, encumbrances and adverse claims, including, but not limited to, liens to secure payment of production taxes, severance taxes and other taxes. As between El Paso and Gatherer, Gatherer shall at all times have the obligation to make settlement for all royalties, overriding royalties and other payments due to the owners of the mineral, royalty and other interests under the properties from which such gas is produced, as modified by such assignments, unitization agreements and other documents as may appear of record or otherwise be binding upon Gatherer or its predecessors in title, and to make settlements with all other persons having any interest in the gas (or the proceeds of the sale thereof) sold by Gatherer hereunder. Gatherer shall save and hold El Paso free and harmless from all suits, actions, debts, accounts, damages, costs, losses and expenses arising from or out of

adverse claims of any and all persons to the gas sold by it hereunder or to royalties, overriding

842

royalties or other payments with respect thereto, or to taxes, licenses, fees or charges thereon which are applicable before the title to the gas passes to El Paso or which may be levied and assessed upon the sale thereof to El Paso, subject, however, to the other provisions of this agreement.

ARTICLE XVI

Use of Gas

All of the gas to be purchased by El Paso from Gatherer under this agreement shall be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps and other facilities located outside of the State of Texas. It is understood, however, that said gas will be commingled with other gas being transported in El Paso's pipe line system.

ARTICLE XVII

Force Majeure

Section 1. Except for El Paso's obligations to make payment for gas delivered hereunder, neither party hereto shall be liable for any failure to perform the terms of this agreement when such failure is due to "force majeure" as hereinafter defined. The term "force majeure" as employed in this agreement shall mean acts of God, strikes, lockouts or industrial disputes or disturbances, civil disturbances, arrests and restraint from rulers or people, interruptions by government or court orders, present and future valid orders of any regulatory body having proper jurisdiction, acts of the public enemy,

(842)

wars, riots, blockades, insurrections, inability to secure labor or inability

843

to secure materials, including inability to secure materials by reason of allocations promulgated by authorized governmental agencies, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, explosions, breakage or accident to machinery or lines of pipe, freezing of wells or pipe lines, inability to obtain easements or rights-of-way, the making of repairs or alterations to pipe lines or plant or any other cause, whether of the kind herein enumerated or otherwise, not reasonably within the control of the party claiming "force majeure". Upon the occurrence of an event constituting "force majeure", the same shall, so far as possible, be remedied with all reasonable dispatch. The settlement of strikes or lockouts or industrial disputes or disturbances shall be entirely within the discretion of the party having the difficulty, and the above requirement that any "force majeure" shall be remedied with all reasonable dispatch shall not require the settlement of strikes, lockouts or industrial disputes or disturbances by acceding to the demands of any opposing party therein when such course is inadvisable in the discretion of the party having the difficulty.

Section 2. It is understood that either party may, without liability to the other party, interrupt the operations of its plants or pipe line system for the purpose of making necessary alterations or repairs thereto, but that such interruptions shall be for only such time as may be reasonable. The party interrupting operations shall give the other party reasonable notice, except in case of emergency, or its intentions so to interrupt operations and of the

estimated time during which no gas will be taken or delivered, as the case may be.

ARTICLE XVIII

Rules and Regulations

This agreement is subject to all present and future valid laws and valid orders, rules and regulations of the United States, the State of Texas, or any duly constituted agency thereof.

ARTICLE XIX

Notices

All notices, statements and other communications required or permitted to be given hereunder shall be in writing and shall be deemed to have been effectively given when mailed by United States mail, postage prepaid and registered, addressed to Gatherer at Petroleum Tower, Corpus Christi, Texas, or to El Paso at P. O. Box 1492, El Paso, Texas, as the case may be, or to such other address as either party shall respectively hereafter designate in writing.

Notices of change of address of any of the parties shall be given in writing to the others in the manner aforesaid and shall be observed in the giving of all future notices, statements or other communications required or permitted to be given hereunder.

ARTICLE XX

Successors and Assigns

This agreement shall bind and benefit the parties hereto and their respective successors and assigns, provided that no conveyance or transfer of any interest of either party shall be

binding upon the other party until such other party has been furnished with written notice and true copy of such conveyance or transfer; provided, further, that either El Paso or Gatherer or both, may assign its right, title and interest in, to and by virtue of this agreement, including any and all extensions, renewals, amendments and supplements thereto, to a trustee or trustees individual or corporate, as security for bonds or other obligations or securities, without such trustee or trustees assuming or becoming in any respect obligated to perform any of the obligations of the assignor, and if any such trustee be a corporation, without its being required by the parties hereto to qualify to do business in the State of Texas.

ARTICLE XXI

Topical Headings

The topical headings used herein are inserted for convenience only and shall not be construed as having any substantive significance or meaning whatsoever or as indicating that all of the provisions of this agreement relating to any particular topic are to be found in any particular article.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be duly executed in duplicate originals, on this

the day and year first above written.

"BUYER"
EL PASO NATURAL GAS COMPANY
By D. H. TUCKER
Vice President

ATTEST:

M. PLUMMER
Assistant Secretary

"SELLER"
LO-VACA GATHERING CO.
By JACK WARE
Vice President

ATTEST:

M. J. ARNOLD
Assistant Secretary

847

Exhibit B-2

Gas purchase agreement dated May 16, 1960, between El Paso Natural Gas Company, buyer, and Lo-Vaca Gatherir Co., seller.

848

GAS PURCHASE AGREEMENT

dated May 16, 1960

between

EL PASO NATURAL GAS COMPANY
Buyer

and

LO-VACA GATHERING CO.
Seller

covering gas produced in South Texas

849

THIS AGREEMENT, made and entered into on this the 16th day of May, 1960, by and between EL PASO NATURAL GAS COMPANY, a Delaware corporation, hereinafter called "El Paso", and LO-VACA GATHERING CO., a Texas corporation, hereinafter called "Gatherer",

WITNESSETH:

That in consideration of the mutual covenants and agreements herein contained, the parties hereto agree as follows:

ARTICLE I

Definitions

Section 1. The term "dedicated reserves" as used in this agreement shall mean the natural gas reserves dedicated by Gatherer to the performance of this agreement as provided in Article II hereof.

Section 2. The term "day" as used in this agreement shall mean a period of twenty-four (24) consecutive hours beginning and ending at seven (7:00) o'clock A.M.

Section 3. The term "month" as used in this agreement shall mean the period beginning at seven (7:00) o'clock A.M. on the first day of a calendar month and ending at seven (7:00) o'clock A.M. on the first day of the next succeeding calendar month.

Section 4. The term "year" as used in this agreement, except as used in Articles X and XIII, shall mean the period

beginning at seven (7:00) o'clock A.M. on the first day of a calendar year and ending at seven (7:00) o'clock A.M. on the first day of the next succeeding calendar year; provided, however, that the period from the date of first deliveries of gas hereunder, or from the date such deliveries are requnired to begin, as the case may be, until the first day of the next succeeding calendar year shall be deemed to be a year, and the period from seven (7:00) o'clock A.M. on the first day of the last calendar year during the term of this agreement until seven (7:00) o'clock A.M.

on the day next succeeding the day when this agreement terminates shall be deemed to be a year.

ARTICLE II

Dedication

Section 1. On or before December 31, 1960, Gatherer shall dedicate to the performance of this agreement natural gas reserves in the Texas Gulf Coast area having an aggregate initial volume equal to or exceeding four hundred (400) billion cubic feet. Dedication of a reserve of natural gas to the performance of this agreement shall occur when Gatherer shall submit to El Paso in writing (a) an accurate description of such natural gas reserve, (b) copies of the contract or other instrument evidencing Gatherer's prior right to withdraw the gas in such reserve and sell and deliver the same to El paso under this agreement, and (c) a statement executed by Gatherer to the effect that such reserve is dedicated to the performance of this agreement. The aggregate initial volume of the dedicated reserves shall be deter-

mined and redetermined from time to time, as provided in Article XIV of this agreement. If the initial determination of the aggregate initial volume of the dedicated reserves shall disclose that such volume is less than four hundred (400) billion cubic feet, Gatherer shall forthwith obtain and dedicate to the performance of this agreement such additional quantity of gas reserves as may be necessary to cause the aggregate initial volume of the dedicated reserves to equal or exceed four hundred (400) billion cubic feet. If, however, after the initial determination any redetermination of the aggregate initial volume of the dedicated reserves shall disclose that such volume is less than four hundred (400) billion cubic feet, Gatherer

shall be obligated only to exercise its best efforts to obtain without economic loss and under reasonable terms and conditions and dedicate to the performance of this agreement such additional quantity of gas reserves as may be necessary to cause the aggregate initial volume of the dedicated reserves to equal or exceed four hundred (400) billion cubic feet.

Section 2. Withdrawals of gas from the dedicated reserves during any month must not exceed deliveries made by Gatherer to El Paso during such month under the provisions of this agreement. By written agreement between Gatherer and El Paso dedicated reserves may be released from this agreement if other gas reserves satisfactory to El Paso are substituted in lieu thereof, in which case such other gas reserves shall become dedicated reserves hereunder.

852

ARTICLE III

Governmental Authority

Section 1. El Paso and Gatherer shall, as soon as possible and in any event not later than June 1, 1960, make such applications and filings to and with the Federal Power Commission as may be required on the part of each such respective party in order to procure such Certificate of Public Convenience and Necessity as is necessary for the construction, ownership and operation by such party of the facilities necessary for it to effect delivery or receipt of gas hereunder or otherwise necessary for such party to perform its obligations under this agreement. Each party making such application shall prosecute the same with diligence to final disposition by the Federal Power Commission and shall promptly notify the other party in writing of the final action taken thereon by the Federal Power Commission.

Section 2. If any Certificate of Public Convenience and Necessity referred to in Section 1 of this article shall be denied, this agreement shall thereupon terminate, and neither party hereto shall thereafter have any liability under this agreement to the other.

Section 3. If any Certificate of Public Convenience and Necessity referred to in Section 1 of this article shall be issued in form and substance unreasonably burdensome to the party receiving the same, such party shall have the right, at its option, to cancel this agreement by giving the other party written notice of such cancellation within thirty (30) days after the final order

issuing such certificate. In case any such notice is given, this agreement shall terminate upon the giving of such notice, and neither party shall thereafter have any liability under this agreement to the other. Acceptance by either party of emergency or temporary Certificates of Public Convenience and Necessity, even though the party accepting the same shall act thereunder, shall not, within the meaning of this article, constitute receipt of a Certificate of Public Convenience and Necessity in form and substance satisfactory to such party unless such party shall notify the other party in writing that it waives all objections to the form or nature of the same.

Section 4. When the Certificates of Public Convenience and Necessity contemplated in this article have been issued and accepted by the respective parties receiving the same, each of such parties shall promptly commence, and thereafter prosecute to completion, the design, acquisition of materials and rights-of-way for and construction of the facilities necessary for it to perform its obligations under this agreement.

(853)

ARTICLE IV

Quantity

Section 1. Commencing as of the earlier of:

(a) The date of completion of all of the facilities referred to in Section 4 of Article III of this agreement, or

(b) July 1, 1961, or such later date as Gatherer shall complete its said facilities and stand ready to deliver gas to El Paso under this agreement,

Gatherer shall sell and deliver to El Paso from the dedicated

854

reserves, and El Paso shall receive from Gatherer from the dedicated reserves and pay for, or pay for whether or not received, during each year, subject to the provisions of Section 2 of this Article IV, a minimum quantity of natural gas per day determined as provided in Article XIV of this agreement. Such minimum quantity shall be averaged over each year. In addition, El Paso shall have the right to purchase and receive from Gatherer such additional quantity of gas from the dedicated reserves as El Paso may desire, and Gatherer shall sell and deliver the same to El Paso; provided, however, that Gatherer shall not be obligated during any day to sell and deliver to El Paso under the terms of this agreement more than one hundred thirty-three per cent (133%) of the minimum daily quantity of gas as last determined pursuant to the provisions of Article XIV of this agreement.

Section 2. Should El Paso fail to purchase and receive from Gatherer during any year the minimum quantity of gas which El Paso was required to purchase and receive from Gatherer during such year pursuant to the provi-

sions of this Article IV, which failure was not due to physical nonavailability of gas, causes within the control of Gatherer, regulation by governmental authority or force majeure intervention, then within thirty (30) days after the end of such year El Paso shall pay Gatherer for that quantity of gas (called "unreceived quantity" in this section) which represents the difference between the minimum quantity of gas which El Paso was required hereunder to purchase and receive from Gatherer during such year and the quantity of gas actually

purchased and received by El Paso from Gatherer hereunder during such year. Payment shall be made at the weighted average price paid by El Paso hereunder for gas during such year. If in any year El Paso fails to purchase and receive from Gatherer during such year the minimum quantity of gas which El Paso was required to purchase and receive from Gatherer during such year pursuant to the provisions of this Article IV, El Paso shall have the right at any time during the next four (4) succeeding years to take and receive the quantity of gas (called "make-up gas" in this section) which it paid for but did not receive during the year when such deficiency occurred; provided, however, that (a) the quantity of gas so taken by El Paso shall not be treated as a part of the minimum quantity of gas which El Paso is obligated to purchase and receive hereunder during any of such succeeding years, and (b) the provisions of this section shall not operate to increase the maximum daily quantity of gas which Gatherer is obligated to deliver to El Paso hereunder, and (c) the provisions of this section shall not operate to extend the term of this agreement. El Paso shall not be required to pay Gatherer for make-up gas unless at the time such make-up gas is received

the price in effect under this agreement is higher than the price paid by El Paso for the corresponding unreceived gas, in which case El Paso shall pay Gatherer for the make-up gas a price per one thousand (1,000) cubic feet equal to the difference between the price per one thousand (1,000) cubic feet then in effect under this agreement and the price per one thousand (1,000) cubic feet paid for the unreceived gas.

856

Section 3. In the event that on any day the deliveries of gas by Gatherer to El Paso hereunder are, (1) by reason of phyical nonavailability of gas, (2) causes within the control of Gatherer, (3) regulation by governmental authority or (4) force majeure intervention, less than one hundred thirty-three per cent (133%) of the minimum daily quantity then in effect hereunder, then in determining for the purposes of Section 2 of this article the average daily volume of gas taken by El Paso hereunder during the year in which such day occurs, there shall be taken, in lieu of the volume of gas (if any) actually delivered by Gatherer to El Paso during such day, a volume of gas equal to one hundred thirty-three per cent (133%) of the minimum daily quantity then in effect hereunder, or the quantity of gas El Paso desired to take, whichever is the lesser.

Section 4. In addition to the quantities herein provided, in the event Gatherer from time to time has excess gas available, Gatherer may, upon its option, offer to sell and deliver such gas to El Paso and El Paso, upon its option, may receive such excess gas and same shall be deemed delivered under this contract and shall be paid for at the applicable price as provided in Article X.

ARTICLE V

Quality

All gas delivered by Gatherer to El Paso under the terms of this agreement shall be natural gas and shall conform to the following specifications (determination as to conformity of the gas with these specifications shall be made in accordance with the generally accepted procedures of the industry):

(a) *Liquids:* The gas shall be free from hydrocarbons and water in liquid form at the temperature and pressure at which delivered.

(b) *Hydrogen Sulphide:* The gas shall not contain more than one (1) grain of hydrogen sulphide per one hundred (100) cubic feet.

(c) *Organic Sulphur:* The gas shall not contain more than twenty (20) grains of organic sulphur (mercaptans) per one hundred (100) cubic feet.

(d) *Carbon Dioxide:* The gas shall not have a carbon dioxide content in excess of two per cent (2%) by volume.

(e) *Dust, Gums, etc.:* The gas shall be commercially free of dust, gums and other solid matter.

(f) *Heating Value:* The total gross heating value of the gas delivered hereunder shall not be less than one thousand (1,000) British thermal units per cubic foot.

ARTICLE VI

Delivery Point and Pressure

Section 1. The point of delivery for all gas to be sold and delivered hereunder shall be a point in the immediate vicinity of Three Rivers, Texas, to be selected by agree-

ment between El Paso and Gatherer, and such other point or points as may be mutually agreed on by the parties hereto.

Section 2. Title to and ownership of the gas delivered hereunder shall pass to and vest in El Paso at the point of delivery. Gatherer shall be solely liable and responsible for said gas prior to the time of delivery thereof to El Paso, and El Paso shall be solely liable and responsible therefor thereafter.

Section 3. Gatherer shall deliver the gas to El Paso at the delivery point at such varying pressures as El Paso may require; provided, however, that Gatherer shall not be obligated to deliver the gas at a pressure in excess of five hundred fifty

pounds (550#) per square inch gauge.

ARTICLE VII

Meters

Section 1. El Paso, at its sole cost and expense, shall install, maintain and operate at the delivery point a standard type orifice meter or meters for the measuring of the quantity of gas delivered hereunder. Orifice meters shall be installed and operated in accordance with the specifications prescribed in Gas Measurement Committee Report No. 3, dated April, 1955, of the Natural Gas Department of the American Gas Association. El Paso shall cause the charts on such meters to be changed each day. The respective meter, meter readings and meter charts shall be accessible at all reasonable times to inspection and examination by Gatherer.

Section 2. From time to time and at least once in each three (3) months, the accuracy of El Paso's measuring equipment shall be verified by and at the expense of El

Paso. If either party at any time shall notify the other that it desires a special test of any meter, the other party shall cooperate to secure and immediate vertification of the accuracy of such meter and joint observation of any adjustments. If any such test shall be requested by Gatherer, and upon such test, the measuring equipment shall be found to be registering correctly, the cost of such test shall be charged to Gatherer, otherwise the cost of all such tests shall be borne by El Paso. El Paso shall give notice to Gatherer of the time of all tests in order that Gatherer may

conveniently have its representative present. Reading, calibration and adjustment of El Paso's meters and changing of charts shall be done only by El Paso.

Section 3. If, upon any test, the percentage of inaccuracy shall be two per cent (2%) or more, the registration of such meter shall be corrected at the rate of such inaccuracy for any period which is definitely known or agreed upon, but in case the period is not definitely known or agreed upon, then for a period extending back one-half (½) of the time elapsed since the date of the last calibration. Following any test, metering equipment found inaccurate shall be immediately restored by El Paso as closely as possible to a condition of accuracy. If, for any reason, any meter is out of service or out of repair so that the amount of gas delivered cannot be estimated or computed from the reading thereof, the amount of gas delivered through the period such meter is out of service or out of repair shall be estimated and agreed upon by the parties hereto upon the basis of the best data available using the first of the following methods which is feasible:

a. By correcting the error if the percentage of error is ascertainable by calibration test or mathematical calculation.

b. By using the registration of Gatherer's check meter if installed and accurately registering.

c. By estimating the quantity of deliveries by deliveries during preceding periods under similar conditions when the meter was registering accurately.

Section 4. Gatherer may, at its option and expense, install

and operate a check meter to check El Paso's meter, but measurement of gas for the purpose of this agreement shall be by El Paso's meter, except as hereinabove specifically provided to the contrary. Such check meter and equipment shall be so installed as not to interfere with the operation of the meter or meters to be installed and maintained by El Paso at or near the point of delivery, as provided for in Section 1 of this Article VII.

Article VIII

Unit of Volume

Section 1. The unit of volume for all purposes hereunder (except for computation of "quality" values under the provisions of Article V) shall be one (1) cubic foot at an absolute pressure of fourteen and sixty-five hundredths pounds (14.65#) per square inch at a temperature of sixty (60) degrees Fahrenheit.

Section 2. The unit of volume for the determination of heating value under subparagraph (f) of Article V hereof shall be the amount of gas, saturated with water vapor, which would occupy a volume of one (1) cubic foot at a temperature of sixty (60) degrees Fahrenheit and under a pressure equivalent to thirty (30) inches of mercury at thirty-two (32) degrees Fahrenheit.

Section 3. The unit of volume for determination of quality values under subparagraphs (b) and (c) of Article V hereof shall be one (1) cubic foot at a temperature of sixty (60) degrees Fahrenheit and under a pressure equivalent to thirty (30) inches of mercury at thirty-two (32) degrees Fahrenheit.

861

Article IX

Measurement

Section 1. All measurement of gas hereunder shall be in accordance with the recommendations for measuring gas contained in Report No. 3 of the Gas Measurement Committee of the American Gas Association, dated April, 1955, applied in a practical and appropriate manner, and correction shall be made for deviation from Boyle's Law.

Section 2. The temperature of the gas flowing through the meter or meters to be installed and maintained by El Paso at the delivery point or points shall be determined by the use of a recording thermometer of standard manufacture installed by El Paso so that it may properly record such temperature. The arithmetical average of the twenty-four (24) hour record, or of that portion of the twenty-four (24) hours during which gas was passing, if gas had not been passing during the entire period, from the recording thermometer shall be taken to be the gas temperature for the day and shall be used to make proper corrections in volume computations.

Section 3. The specific gravity of the gas delivered hereunder shall be determined by the use of a recording gravitometer to be installed, maintained and operated by El Paso at each delivery point. The arithmetical average of the hourly specific gravity during each twenty-four (24) hour period, or during that period which gas was actually passing, shall be used to make proper computations.

Section 4. The gross heating value of the gas shall be determined by El Paso at intervals of three (3) months or by means of a recording calorimeter of the Thomas type, at the option of El Paso.

ARTICLE X

Price

Section 1. The price to be paid by El Paso to Gatherer per one thousand (1,000) cubic feet for all natural gas sold hereunder shall be as follows:

(a) For the four (4) year period commencing on the date specified in Section 1 of Article IV of this agreement, twenty-two cents (22¢).

(b) For the next four (4) year period, twenty-three cents (23¢).

(c) For the next four (4) year period, twenty-four cents (24¢).

(d) For the next four (4) year period, twenty-five cents (25¢).

(e) For the next four (4) year period, twenty-six cents (26¢).

Section 2. It is recognized that the prices provided for in this contract are presently subject to Federal Power Commission regulation. In the event the Commission shall at any time order a reduction in the contract prices herein, then El Paso agrees that Gatherer may subsequently, at its option, file for such higher price as Gatherer may feel is justified, providing for

but not exceeding the revenues to which Gatherer is entitled as provided in this Article X hereof. Gatherer may file for

any such price sufficiently in advance of the date of any contract price increase to make up for any prior lag in collecting the contract price.

ARTICLE XI

Billing and Payment

Section 1. On or before the tenth (10th) day of each calendar month, El Paso shall render to Gatherer a statement showing the amount of gas purchased by El Paso hereunder during the preceding calendar month, and payment for such gas shall be made by El Paso to Gatherer on or before the twenty-fifth (25th) day of the calendar month in which such statement is rendered. Any errors in such statement or payment shall be promptly reported to El Paso, and El Paso shall make proper adjustment thereof within thirty (30) days after final determination of the correct volume or values involved; provided, however, that if no such errors are reported to El Paso within one (1) year from the date such statement or payment was submitted to Gatherer the same shall be conclusively deemed to be correct.

Section 2. Upon request, El Paso shall furnish Gatherer the measurement charts applicable to any monthly statement. Gatherer shall return to El Paso all such charts within thirty (30) days after receipt, and Gatherer shall have access to El Paso's records and books at all reasonable hours so far as they pertain to the gas sold hereunder.

864

ARTICLE XII

Taxes

Section 1. Subject to the other provisions of this article, Gatherer shall pay or cause to be paid all taxes and assessments imposed on Gatherer with respect to the gas de-

livered hereunder prior to its delivery to El Paso, and El Paso shall pay or cause to be paid all taxes and assessments imposed upon El Paso with respect to the gas delivered hereunder after its receipt by El Paso. Neither party shall be responsible or liable for any taxes or other statutory charges levied or assessed against any of the facilities of the other party used for the purpose of carrying out the provisions of this agreement.

Section 2. Any sales, transaction, occupation, service, production, severance, gathering, transmission, export or excise tax, assessment or fee levied, assessed or fixed by the United States, the State of Texas, or other governmental authority and taxes of a similar nature or equivalent in effect (not including income, excess profits, capital stock, franchise or general property taxes) in respect of or applicable to the gas delivered hereunder to El Paso in addition to or greater than those, if any, being levied, assessed or fixed on the date of this agreement in respect of or applicable to such gas and which Gatherer may be liable for, either directly or indirectly, or through any obligation to reimburse others, are hereinafter collectively referred to as an "additional tax"; provided, however, that all existing taxes, up to the present respective rates thereof, now

imposed on the parties hereto shall not be considered as an additional tax. It is expressly understood and agreed between the parties hereto that El Paso shall, subject to the conditions hereinafter set forth, pay to Gatherer three-fourths (¾ths) of any such additional tax. Should Gatherer so become liable for any such additional tax, Gatherer shall notify El Paso immediately. Within ninety (90) days after the end of each calendar month, Gatherer shall prepare and submit to El Paso a statement setting

fourth the amount of any such additional tax that Gatherer has paid during such calendar month, and within thirty (30) days after submission of such statement, adjustment between the parties hereto shall be made by El Paso reimbursing Gatherer to the extent of three-fourths (¾ths) of the amount of any such additional tax which Gatherer shall have so paid. The tax reimbursement herein provided for shall apply to the total amount of money Gatherer is required to pay by virtue of any such additional tax but shall not apply to any delinquent interest or penalty payments that may be applicable to any such additional tax. Taxes applicable to any royalty, overriding royalty, production payment or similar interest shall be considered to be covered by the provisions of this Section 2 only if the reimbursement made by El Paso to Gatherer with respect thereto is passed on by Gatherer to the owner of such royalty, overriding royalty, production payment or similar interest.

866

ARTICLE XIII

Term

Subject to the other provisions of this agreement, this agreement shall be effective from the date hereof and shall continue in force for a term of twenty (20) years from the date specified in Section 1 of Article IV of this agreement.

ARTICLE XIV

Gas Reserves

Section 1. As soon as may be reasonably practical El Paso and Gatherer shall conduct a joint study of the dedicated reserves to determine the quantity of recoverable gas contained therein. Upon demand of either party a similar study shall be conducted from time to time there-

(866)

after but not more often than once each two (2) years. Each such study shall give proper consideration to development, operating conditions, producing conditions, applicable orders, rules and regulations of regulatory authorities, and other relevant factors and shall determine as nearly as can be determined the quantity of gas then remaining on the date of such study which can thereafter be produced for delivery to El Paso under the provisions of this agreement. To the quantities so determined by the last such study shall be added the quantity of gas theretofore delivered to El Paso under this agreement. The quantity of gas arrived at by such addition is called the "aggregate initial volume" of the dedicated reserves in this article and in Article II of this agreement. For all purposes the volume of recoverable gas in the dedicated reserves

867

shall be determined by calculations based on a terminal bottom hole pressure of five hundred pounds (500±) per square inch absolute or such lower pressure as El Paso and Gatherer may agree upon at the time of each dedication.

Section 2. The number of billions of cubic feet of gas found by the last reserve study to constitute the aggregate initial volume of the dedicated reserves shall be divided by eight (8) and the quotient so obtained shall be multiplied by one million (1,000,000). The product of such multiplication shall be the number of cubic feet of gas which shall be the minimum daily quantity of gas, averaged over each year, which El Paso shall be obligated to purchase under the provisions of this agreement; provided, however, that such minimum daily quantity shall not exceed fifty million (50,000,000) cubic feet of gas; and, provided further, that if the aggregate initial volume of the dedicated reserves

shall ever exceed four hundred (400) billion cubic feet, Gatherer shall have the right to deliver the excess over four hundred (400) billion cubic feet to others, subject to the conditions that: (a) such deliveries shall not interfere in any way with deliveries of gas to El Paso under this agreement and (b) the quantity of gas which can be so delivered to others shall be redetermined, and may be increased or decreased, at the time of each subsequent reserve study.

Section 3. If El Paso and Gatherer shall disagree as to any fact or facts to be determined by any joint study mentioned in this article the same shall be determined by arbitration in the following manner:

El Paso shall appoint one competent geologist or reservoir engineer and Gatherer shall appoint one competent geologist or

reservoir engineer and the two so appointed shall select a third competent geologist or reservoir engineer. If either El Paso or Gatherer shall fail to appoint a geologist or reservoir engineer within ten (10) days after a request for such appointment is made by the other party in writing, or if the two geologists or reservoir engineers so appointed shall fail within ten (10) days after the appointment of the second of them to agree on a third geologist or reservoir engineer, the geologist or reservoir engineer necessary to complete a board of three geologists or reservoir engineers shall be appointed upon application by either party therefor by the United States District Judge, senior in point of service, of a Federal Judicial District in which some part of the property covered by this agreement is situated. In the event such judge shall fail or refuse to act, then either party hereto may request the American Arbitration Association to select the geologist or reservoir engineer to com-

plete the board of three. After three geologists or reservoir engineers are appointed pursuant to the foregoing provisions of this article they shall meet, hear the parties with respect to the matter of said fact or facts, and arrive at a determination of said fact or facts. Any determination agreed to in writing by at least two of said geologists or reservoir engineers shall be final and binding on the parties hereto. All geologists or reservoir engineers appointed pursuant to this article shall be individuals experienced in the oil and gas industry and competent to pass on the matter of said fact or facts. The fees and expenses of the geologists or reservoir engineers shall be borne equally by the parties hereto.

Section 4. Gatherer shall, from time to time, at El Paso's

request, furnish to El Paso such geological, engineering and production data as may be available to Gatherer and as may be desired by El Paso for a study of the dedicated reserves and the deliverability thereof and which will enable El Paso to make and maintain currently its own reserve and deliverability studies.

ARTICLE XV

Title

Gatherer hereby warrants title to the gas sold by it hereunder and its right to sell the same and warrants that all such gas is owned by Gatherer free from all liens, encumbrances and adverse claims, including, but not limited to liens to secure payment of production taxes, severance taxes and other taxes. As between El Paso and Gatherer, Gatherer shall at all times have the obligation to make settlement for all royalties, overriding royalties and other payments due to the owners of the mineral, royalty and

other interests under the properties from which such gas is produced, as modified by such assignments, unitization agreements and other documents as may appear of record or otherwise be binding upon Gatherer or its predecessors in title, and to make settlements with all other persons having any interest in the gas (or the proceeds of the sale thereof) sold by Gatherer hereunder. Gatherer shall save and hold El Paso free and harmless from all suits, actions, debts, accounts, damages, costs, losses and expenses arising from or out of adverse claims of any and all persons to the gas sold by it hereunder or to royalties, overriding royalties, or other payments with respect thereto, or to taxes, licenses, fees or charges thereon which are applicable before the title to the gas passes to El Paso or which may be levied and assessed upon the sale thereof to El Paso, subject, however, to the other provisions of this agreement.

870

ARTICLE XVI

Force Majeure

Section 1. Except for El Paso's obligations to make payment for gas delivered hereunder, neither party hereto shall be liable for any failure to perform the terms of this agreement when such failure is due to "force majeure" as hereinafter defined. The term "force majeure" as employed in this agreement shall mean acts of God, strikes, lockouts or industrial disputes or disturbances, civil disturbances, arrests and restraint from rulers or people, interruptions by government or court orders, present and future valid orders of any regulatory body having proper jurisdiction, acts of the public enemy, wars, riots, blockades, insurrections, inability to secure labor or inability to secure materials, including inability to secure materials by reason of allocations promulgated by authorized governmental agencies, epidemics, landslides, lighting, earth-

quakes, fire, storm, floods, washouts, explosions, breakage or accident to machinery or lines of pipe, freezing of wells or pipe lines, inability to obtain easements or rights-of-way, the making of repairs or alterations to pipe lines or plant, or any other cause, whether of the kind herein enumerated or otherwise, not reasonably within the control of the party claiming "force majeure". Upon the occurrence of an event constituting "force majeure", the same shall, so far as possible, be remedied with all reasonable dispatch. The settlement of strikes or lockouts or industrial disputes or disturbances shall be entirely within the discretion of the

party having the difficulty, and the above requirement that any "force majeure" shall be remedied with all reasonable dispatch shall not require the settlement of strikes, lockouts or industrial disputes or disturbances by acceding to the demands of any opposing party therein when such course is inadvisable in the discretion of the party having the difficulty.

Section 2. It is understood that either party may, without liability to the other party, interrupt the operations of its plants or pipe line system for the purpose of making necessary alterations or repairs thereto, but that such interruptions shall be for only such time as may be reasonable. The party interrupting operations shall give the other party reasonable notice, except in case of emergency, of its intentions so to interrupt operations and of the estimated time during which no gas will be taken or delivered, as the case may be.

Article XVII

Rules and Regulations

This agreement is subject to all present and future valid laws and valid orders, rules and regulations of the United

States, the State of Texas, or any duly constituted agency thereof.

ARTICLE XVIII

Notices

All notices, statements and other communications required or permitted to be given hereunder shall be in writing and shall be deemed to have been effectively given when mailed by United States mail, postage prepaid and registered, addressed to Gatherer

at Petroleum Tower, Corpus Christi, Texas, or to El Paso at P. O. Box 1492, El Paso, Texas, as the case may be, or to such other address as either party shall respectively hereafter designate in writing.

Notices of change of address of any of the parties shall be given in writing to the others in the manner aforesaid and shall be observed in the giving of all future notices, statements or other communications required or permitted to be given hereunder.

ARTICLE XIX

Successors and Assigns

This agreement shall bind and benefit the parties hereto and their respective successors and assigns, provided that no conveyance or transfer of any interest of either party shall be binding upon the other party until such other party has been furnished with written notice and true copy of such conveyance or transfer; provided, further, that either El Paso or Gatherer, or both, may assign its right, title and interest in, to and by virtue of this agreement, including any and all extensions, renewals, amendments and supplements thereto, to a trustee or trustees, individual or

corporate, as security for bonds or other obligations or securities, without such trustee or trustees assuming or becoming in any respect obligated to perform any of the obligations of the assignor, and if any such trustee be a corporation, without its being required by the parties hereto to qualify to do business in the State of Texas.

873

ARTICLE XX

Additional Sales

The parties hereto contemplate that El Paso shall have the right, at its option, but shall not be obligated, to purchase additional gas from Gatherer and that Gatherer, if El Paso shall exercise such option, shall sell and deliver additional gas to El Paso at a price and upon terms to be hereafter determined by mutual agreement, depending upon the availability of additional gas in Gatherer's pipe line system, the need of gas from Texas Gulf Coast sources by El Paso and all other pertinent factors.

ARTICLE XXI

Topical Headings

The topical headings used herein are inserted for convenience only and shall not be construed as having any substantive significance or meaning whatsoever or as indicating that all of the provisions of this agreement relating to any particular topic are to be found in any particular article.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be duly executed in duplicate originals, on this the day and year first above written.

"BUYER"
EL PASO NATURAL GAS COMPANY
By D. H. TUCKER
D. H. TUCKER—*Vice President*

"SELLER"
LO-VACA GATHERING CO.
By JACK WARE
Vice President

ATTEST:
M. PLUMMER
Assistant Secretary

ATTEST:
M. J. ARNOLD
Asst. Secretary

874

Exhibit B-3

List of contracts dedicated to sale to El Paso Natural Gas Company.

875

GAS DEDICATED BY LO-VACA GATHERING COMPANY TO EL PASO NATURAL GAS COMPANY

Date of Contract	Contract Number	Seller	Name and Location of Field or Area
3/29/60	5220-A	Phillips Petroleum Company, *et al.*	Fashing Field Area, Atascosa County, Texas
4/12/60	5220-B	Miller & Fox	Tulsita-Wilcox (North Pettus) Area in Bee, Goliad and Karnes Counties, Texas
3/ 1/60	5220-LO	Melba Production Company, Operator	Mt. Lucas Area, Live Oak County, Texas
3/ 1/60	5220-CA	Tex-Star Oil & Gas Corp., *et al.*	Magnolia Beach Field, Calhoun County, Texas
4/13/60	5221-CA	Tex-Star Oil & Gas Corp., *et al.*	Magnolia Beach Field, Calhoun County, Texas
4/13/60	5222-CA	Tex-Star Oil & Gas Corp., *et al.*	Magnolia Beach Field, Calhoun County, Texas

(876)

876

Exhibit C

CONTRACT SUMMARIES

877

SUMMARY OF CONTRACT DATED MARCH 15, 1960

1. Name of seller:	Lo-Vaca Gathering Co.
2. Name of purchaser:	El Paso Natural Gas Company.
3. Location of sale:	Live Oak County, Texas.
4. Date of Contract:	March 15, 1960.
5. Initial price per Mcf:	22¢
6. Measurement pressure base: (psia)	14.65
7. Type of escalation provision:	Periodic: one cent per Mcf after every four-year period.
8. Hydrocarbon liquids included:	None
9. Other price adjustments:	Buyer to reimburse seller for three-fourths of any increase in tax after date of contract.
10. Estimated daily volumes:	50,000,000 cubic feet.
11. Delivery pressure:	550 pounds psig.
12. Delivery point:	At termination of gathering system at a point to be agreed upon near Three Rivers, Live Oak County, Texas.

878

SUMMARY OF CONTRACT DATED MAY 16, 1960

1. Name of seller:	Lo-Vaca Gathering Co.
2. Name of purchaser:	El Paso Natural Gas Company.
3. Location of sale:	Live Oak County, Texas.
4. Date of Contract:	May 16, 1960.
5. Initial price per Mcf:	22¢
6. Measurement pressure base: (psia)	14.65
7. Type of escalation provision:	Periodic: one cent per Mcf after every four-year period.
8. Hydrocarbon liquids included:	None
9. Other price adjustments:	Buyer to reimburse seller for three-fourths of any increase in tax after date of contract.
10. Estimated daily volumes:	50,000,000 cubic feet.
11. Delivery pressure:	550 pounds psig.
12. Delivery point:	At termination of gathering system at a point to be agreed upon near Three Rivers, Live Oak County, Texas.

879

AFFIDAVIT

DISTRICT OF COLUMBIA) ss:

Bradford Ross, being first duly sworn, deposes and says that he is the attorney for Lo-Vaca Gathering Co.; that he has read the foregoing "Application for Certificate of Public Convenience and Necessity"; that the statements therein contained are true to the best of his knowledge, information and belief; and that he is authorized to file the same with the Federal Power Commission.

/s/ BRADFORD ROSS
Bradford Ross

Subscribed and sworn to before me by the said Bradford Ross, this 1st day of June, 1960.

/s/ DEBRA DINGWALL
Notary Public

(SEAL)

My Commission expires June 14, 1964.

880

[CERTIFICATE OF SERVICE]

907

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

Docket No. CP61-177

In the Matter of
HOUSTON PIPE LINE COMPANY

Petition of Houston Pipe Line Company for a Declaratory Order to Remove Uncertainty.

908

COMES NOW Houston Pipe Line Company (hereinafter called "Houston") pursuant to the provisions of Section

1.7(c) of the Rules of Practice and Procedure of the Federal Power Commission (hereinafter called "Commission") and petitions the Commission for a declaratory order to remove uncertainty as to the jurisdiction of the Commission under the Natural Gas Act over the proposed sale hereinafter described and for a declaration of the Commission that it has no jurisdiction under the Natural Gas Act over such sale because it will be wholly in intrastate commerce. In support of this motion Houston respectfully states as follows:

I.

Houston is a Texas corporation having its principal offices in the Petroleum Building, Houston, Texas. Since 1925 Houston has been, and presently is, engaged in the

intrastate purchase, transportation and sale of natural gas within the State of Texas only. Houston currently delivers an average of approximately 500,000,000 cubic feet of gas daily to its present customers. The gas which it purchases and transports is sold by it either to distributing companies for resale by them for ultimate consumption in Texas communities or to industrial and commercial consumers located in the Texas Gulf Coast area. Houston presently has available for sale substantial volumes of pipeline-quality natural gas which it proposes to sell to El Paso Natural Gas Company (hereinafter called El Paso Natural").

II.

By force of covenants in virtually all of its gas supply contracts, Houston is prohibited, except by consent of the sellers of gas to it, from introducing into interstate commerce any of the gas which it purchases. Virtually all

contracts pursuant to which Houston purchases gas contain the following provision, or a provision of like tenor and effect:

"XVII. Sales by Buyer in Interstate Commerce.

"17.1 Buyer [Houston] represents that Buyer has no present desire or intention that the gas delivered to Buyer by Seller hereunder be transported in interstate commerce or sold for resale in interstate commerce. If because of changed conditions which Buyer cannot now foresee, Buyer should desire to transport or sell gas delivered hereunder into interstate commerce, Buyer shall

give Seller not less than sixty (60) days' prior written notice of its intention to sell or deliver any gas purchased hereunder for transportation, sale or resale in interstate commerce, as such term is defined in the Natural Gas Act (June 21, 1938, c. 556, Sec. 24, 52 Stat. 833, Ch. 1513, Title 15, U.S.C.A.), as heretofore or hereafter amended, or in substitute legislation covering the same or similar subject matter, and notwithstanding any other provision hereof, Seller shall have and is hereby given the continuing right and option to cancel and terminate this contract at any time during the period of fifty-five (55) days next following the receipt by Seller of any such notice from Buyer by the giving of written notice of such cancellation and termination to Buyer within such period of time, but not thereafter. The failure of Seller to cancel and terminate this contract according to the provisions of this Article XVII within such period after receipt of any such notice from Buyer shall be conclusively presumed to be an election by Seller not to cancel and terminate this contract and Seller shall thereafter be obligated to

cooperate with Buyer in making the certificate applications, rate filings, and other filings in accordance with the said Natural Gas Act, as heretofore or hereafter amended, or as required in substitute legislation covering the same or similar subject matter."

In the light of such representations and contractual obligations Houston cannot make gas available to El Paso Natural from its existing system and gas supply if the gas is moved or sold in interstate commerce. Any attempt by Houston to obtain consent from its producers for sale in interstate commerce from existing gas reserves would require renegotiation with such producers which would most certainly raise the cost of gas to Houston and hence to El Paso Natural.

III.

El Paso Natural and Houston, on July 19, 1960, entered into a contract (hereinafter called the "Contract") for the intrastate sale of gas by Houston to El Paso Natural of up to 77,000,000 cubic feet per day of fuel gas to be delivered by Houston at a point near Three Rivers, Live Oak County, Texas.[1] This gas is desired by El Paso Natural to increase its available reserves.

A principal reason for the desire of El Paso Natural to obtain gas already gathered by Houston is that the price to El Paso Natural under the proposed arrangement is tied to Houston's weighted average field cost of gas, which is a lesser cost than could be expected by El Paso Natural if El Paso Natural had to build its own gathering system and buy from producers under new sales agreements.

[1] A copy of the Contract is contained in El Paso Natural's original application for a certificate of public convenience and necessity in Docket No. CP 61-26, Exhibit "H", and is incorporated herein by reference.

Because of the rights of cancellation of its producers, as heretofore described, Houston's obligations under the Contract are conditioned upon a holding by the Commission that neither Houston nor any of its producers would become "natural gas companies" under the Natural Gas Act by virtue of the consummation of the transaction with El Paso Natural.

912

For these reasons Houston petitions the Commission for a declaration that the proposed transaction (described in detail later herein) with El Paso Natural will not subject Houston or its producers to the jurisdiction of this Commission.

IV.

The Contract requires that all the gas purchased from Houston be used and consumed by El Paso Natural solely as fuel in the operation of El Paso Natural's fuel consuming facilities in Texas and as fuel in the gasoline plant of Phillips Petroleum Company in Ector County, Texas (Contract Article II). It is contemplated that both at the point of delivery (Three Rivers, Texas) of this gas to El Paso Natural and downstream therefrom the gas will be commingled with other Texas-produced gas sold to El Paso Natural and at least some of this other gas will have been sold to El Paso Natural for resale for ultimate public consumption outside of Texas.[2]

[2] El Paso Gas Supply Company, believed to be a wholly owned subsidiary of El Paso Natural, has agreed with El Paso Natural to transport this common stream of gas from this delivery point near Three Rivers, Texas to El Paso Natural's Sonora plant in Sutton County, Texas where the gas will be taken into El Paso Natural's system. The transportation agreement between El Paso Natural and El Paso Gas Supply Company is contained in El Paso Gas Supply Company's original application for a certificate of public convenience and necessity in Docket No. CP 60-101, Exhibit "P", in which original application El Paso Gas Supply Company has requested authorization to commence services and construct the facilities necessary to render this transportation service.

913

There are attached hereto as Exhibits "A" and "B" flow diagrams prepared by El Paso Natural's engineering staff showing the locations of the various fuel consuming facilities located within the State of Texas at which the gas sold by Houston to El Paso Natural will be consumed and the routes which will be traveled to those points. In addition, tables appear on the faces of the diagrams showing the average and maximum daily consumption of gas, respectively, at such facilities as have been constructed and operated in the past and an estimate of the anticipated average and maximum daily fuel requirements, respectively, at those facilities which are not yet in operation. Houston is informed that these diagrams will appear in a supplement to El Paso Natural's Original Application in Docket No. CP 61-26.

In the Contract (Article II) El Paso Natural has covenanted that all compressors and other installations consuming gas sold under the Contract shall physically be located on its system of pipelines and laterals within the State of Texas through which the flow of gas, although commingled with other gas, shall at all times be continuous and downstream from the originating delivery point. A sufficient volume of the commingled stream of gas shall by said physical connections reach and pass into compressor stations or other fuel consuming facilities located in Texas which

914

shall in the aggregate consume a volume of gas equal to or greater than the volume of gas contributed into the commingled stream at the delivery point by Houston. El Paso Natural has covenanted (Contract Article II) to retain for a period of years and to supply on demand meter reading charts taken from meters located on such system

to assure proof at all times of the foregoing described continuous flow and consumption of the gas.

All of the gas with which Houston's gas will be commingled by the time it reaches the points of consumption in Texas will have been produced in Texas. A volume of gas equal to or in excess of the volume of gas delivered by Houston to El Paso Natural will either be consumed by El Paso Natural in its gas fuel consuming facilities within the State of Texas, or will be delivered by El Paso Natural to Phillips Petroleum Company at the latter's gasoline plant (Contract Article II).

El Paso Natural proposes to construct three new "field fuel pipelines" in order that three facilities will receive their entire fuel gas supply from the common stream into which Houston will deliver gas.[3] The other existing

and proposed components of El Paso Natural's plant within Texas which will consume fuel gas from the common stream already receive their supplies of fuel gas from the main transmission lines which will be carrying the common stream to which Houston will have contributed. Phillips' gasoline plant has previously met all of its fuel gas requirements with gas that has been produced in Texas which has been delivered to it by El Paso Natural.

None of the producers who have previously sold gas to El Paso Natural will be replaced by the proposed transaction as El Paso Natural will continue to buy from them.

V.

There would be no question but that Houston's purchase from its producers and its proposed transportation and sale

[3] Paragraph IV.D. of El Paso Natural's original application for a certificate of public convenience and necessity in Docket No. CP 61-26.

of gas would not be jurisdictional if the subject gas were to be transported in a separate pipeline between the identical points of delivery and consumption within the State.[4] The requisite character of *interstate commerce* would be lacking because the gas would not go "between any point in a state and any point outside thereof, or between points within the same state but through any place outside

thereof . . ."[5] In addition, with respect to the sale by Houston, there would be no "*sale . . . for resale* for ultimate public consumption for domestic, commercial, industrial, or any other use" of any of the gas other than that small portion to be delivered by El Paso Natural to Phillips.[6] The proposed sale differs only in the respect that the gas will move in a commingled stream. However, the identical volume of commingled gas will be separated from the remainder of the commingled stream and required by contract to be used within the state of origin and will thus retain its intrastate character. If the gas to be sold by Houston were sold without any restrictions on its use, then the entire sale would probably be subject to the jurisdiction of the Commission as being a sale in interstate commerce even though part of the gas would not pass beyond the boundaries of the state.[7] However, the authorities are clear that where the gas is required to be taken from the commingled stream, the Commission has no jurisdiction over the gas sold under such conditions.

No clearer statement of Houston's position could be made than that of the Examiner in the controlling analogous

---

[4] See e.g., Federal Power Commission v. J. M. Huber Corp., 133 F.S. 479 (D.C. N.J. 1955); affirmed 236 F. 2d 550; cert. denied 352 U.S. 971, 1 L. Ed. 2d 324.

[5] Sections 1(b) and 2(7) of the Natural Gas Act.

[6] Section 1(b) of the Natural Gas Act.

[7] See e.g., Deep South Oil Co. v. Federal Power Commission (5th Cir. 1957), 247 F. 2d 882.

case subsequently styled *State of North Dakota* v. *Federal Power Commission*, 247 F. 2d 173 (1957).[8] The language was approved by the Commission and subsequently by the United States Court of Appeals for the Eighth Circuit in the following manner:

> "The FPC held that it has no jurisdiction over the sales made by Signal and Amerada under the 'firm gas' contracts. The holding was, of course, based on the finding that the 'firm gas' contracts were clearly *intrastate* in nature and accordingly outside the jurisdiction of the FPC." (Page 175)
>
> • • • • •
>
> "Our question is—referring only to the Tioga-Williston lateral distributions — does natural gas produced, wholesaled, transported, and sold within the State of North Dakota become a proper subject for federal regulation as being in interstate commerce, because *part of its transportation occurs in a commingled state with gas admittedly being transported in interstate commerce*, the purchase contracts for such gas distributed within the state having been executed with each supplier one day prior to execution of the corresponding interstate 'dump gas', contracts? The Examiner's answer to the question, which was approved by the FPC, was:
>
> " 'At the outset it should be noted that this Commission clearly has no jurisdiction over the sales made by Signal and Amerada under the 16¢ "firm gas" contracts. Under Section 1(b) of the Natural Gas Act this Commission has jurisdiction only over the transportation of natural gas in interstate com-

[8] A schematic diagram of the facts of this case is attached hereto as Exhibit "C".

(917)

merce, or the sale in interstate commerce of natural gas for resale. It has no authority

918

to regulate intrastate sales. The gas sold under the instant 16¢ contracts is admittedly produced and consumed wholly within the State of North Dakota, both in the communities served from the Tioga-Minot line and in the communities served from the Tioga-Williston line. The conclusion that they are accordingly intrastate contracts is so obvious as to require no extended discussion. The fact that this gas travels over the Tioga-Williston line in one stream, along with the gas purchased under the 9¢ "dump gas" interstate contracts does not convert the 16¢ "firm gas" contracts into interstate contracts.'

"We think the Examiner was eminently correct." (Page 176)

This case confirms an unquestioned, controlling principle: *A sale of gas, even for resale, with a contractual obligation that it be consumed in the state of production is not jurisdictional even though the gas be commingled with gas which has not yet but eventually will be transported beyond the state of production.*

And, of course, the *North Dakota* case was one in which the sale to the interstate pipeline was clearly a *sale for resale,* even though the resale was to take place in the state of production. The gas to be sold by Houston to El Paso Natural is not sold for resale, but is for consumption by El Paso Natural except that small part resold in Texas to Phillips for use by the latter as fuel.

This contractual separation of nonjurisdictional from jurisdictional gas in a physically commingled stream was the basis of the Commission's ruling and the Court's holding

919

in *City of Hastings, Nebraska* v. *Federal Power Commission*, 221 F. 2d 31, 32 (D.C. Cir. 1954).[9] In the *City of Hastings* case, gas from outside Nebraska was delivered into the distribution system of the City of Hastings, Nebraska. Within the city's distribution system the stream was either sold by the city to its citizens or consumed by the city as fuel in its power plant. Because the gas to be used by the city in its power plant as fuel (not for resale) was contractually separated from the commingled stream after being received by the city, the gas sold for use as fuel was nonjurisdictional.

Recently (February 3, 1959) in the matter of *Hope Producing Company*, Docket No. G-15537, the Commission permitted a Louisiana producer (Hope) to abandon jurisdictional sales to an interstate pipeline company (Arkansas-Louisiana Gas Company) in order that the producer could sell the gas d. ctly to a Louisiana customer of the interstate pipeline company with the gas being transported to that customer by the pipeline company. The gas transported by the pipeline company was commingled with gas destined for out of state and the Commission held, without hesitation, that the sale by the producer to the pipeline's customer was in intrastate

920

commerce and therefore nonjurisdictional even though there was commingling of the gas.

The only other significant case arising under the Natural Gas Act dealing with the problem of Commission jurisdiction over a delivery of contractually separated gas from a commingled stream is the recent Commission decision in *Oklahoma Natural Gas Company*, Docket No. G-19593, and

[9] A schematic diagram of the facts of this case is attached hereto as Exhibit "D".

(920)

Consolidated Gas Utilities Corporation, Docket No. G-19594, issued February 2, 1960, rehearing denied March 25, 1960.[10] This case clearly recognized the validity of the principle announced in the *North Dakota* case, discussed above, but held that principle inapplicable in the *Oklahoma Natural* case in which the gas was commingled with gas which had come from *beyond* the state as distinguished from being commingled with gas produced *within* the state as was done in the *North Dakota* case. The Commission also voiced its disapproval of an attempt to replace a jurisdictional sale to cities served by the pipeline with a nonjurisdictional sale of local gas.

Without regard to whether or not the *Oklahoma Natural* case is valid, it is not applicable here because none of the gas in the commingled stream will be produced outside the State of Texas.

921

The Commission's disapproval in the *Oklahoma Natural* case of an attempted replacement of a jurisdictional transaction with what the Applicant there urged to be a nonjurisdictional intrastate transaction was obviously not considered by the Commission as a legal basis for its holding. The Commission in the *Hope Producing Company* case, supra, permitted the substitution of a nonjurisdictional intrastate sale to a pipeline company's customer for a jurisdictional interstate sale to the pipeline company. Thus, the fact that there previously existed an interstate jurisdictional transaction does not make the substituted transaction also interstate. The Commission, in the *Oklahoma Natural* case, was therefore voicing its disapproval of a substitution rather than holding that the substitution itself made the transaction interstate in character. However, the disapproved act of replacing a presently existing jur-

[10] A schematic diagram of the facts of this case is attached hereto as Exhibit "E".

isdictional transaction by a nonjurisdictional transaction will not occur here as El Paso Natural's use of gas as fuel and the sale by El Paso Natural to Phillips of fuel gas are not jurisdictional. No present jurisdictional sources of supply to El Paso Natural will be replaced—the supply will merely be increased.

Therefore, the *North Dakota* case, supra, and not the *Oklahoma Natural* case governs the proposed transaction. Because the proposed transaction will be intrastate, neither

Houston nor its producers will be subject to the jurisdiction of the Commission and Houston can make this sale to El Paso Natural without violating its contracts with its suppliers and without fear of losing its source of supply from these producers.

WHEREFORE, premises considered, Houston Pipe Line Company prays that the Commission enter a Declaratory Order that neither Houston Pipe Line Company nor the sellers of gas to it will become natural gas companies subject to the jurisdiction of the Commission under the Natural Gas Act on account of the proposed transactions described herein.

Respectfully submitted,

HOUSTON PIPE LINE COMPANY

By FULBRIGHT, CROOKER, FREEMAN, BATES & JAWORSKI
Hugh Q. Buck
Jefferson D. Giller
Richard L. McGraw

By (S) HUGH Q. BUCK
8th Floor, Bank of the Southwest Building,
Houston 2, Texas
Its Attorneys

923

THE STATE OF TEXAS }
COUNTY OF HARRIS }

HUGH Q. BUCK, being first duly sworn, deposes and says that he is an attorney and Attorney-in-Fact for Houston Pipe Line Company; that he has signed the foregoing document for and on behalf of the said Houston Pipe Line Company; that he is authorized to do so; that he has read said document and is familiar with the contents thereof; and that the matters and things set forth are true and correct to the best of his knowledge, information, and belief.

(S) HUGH Q. BUCK
Hugh Q. Buck

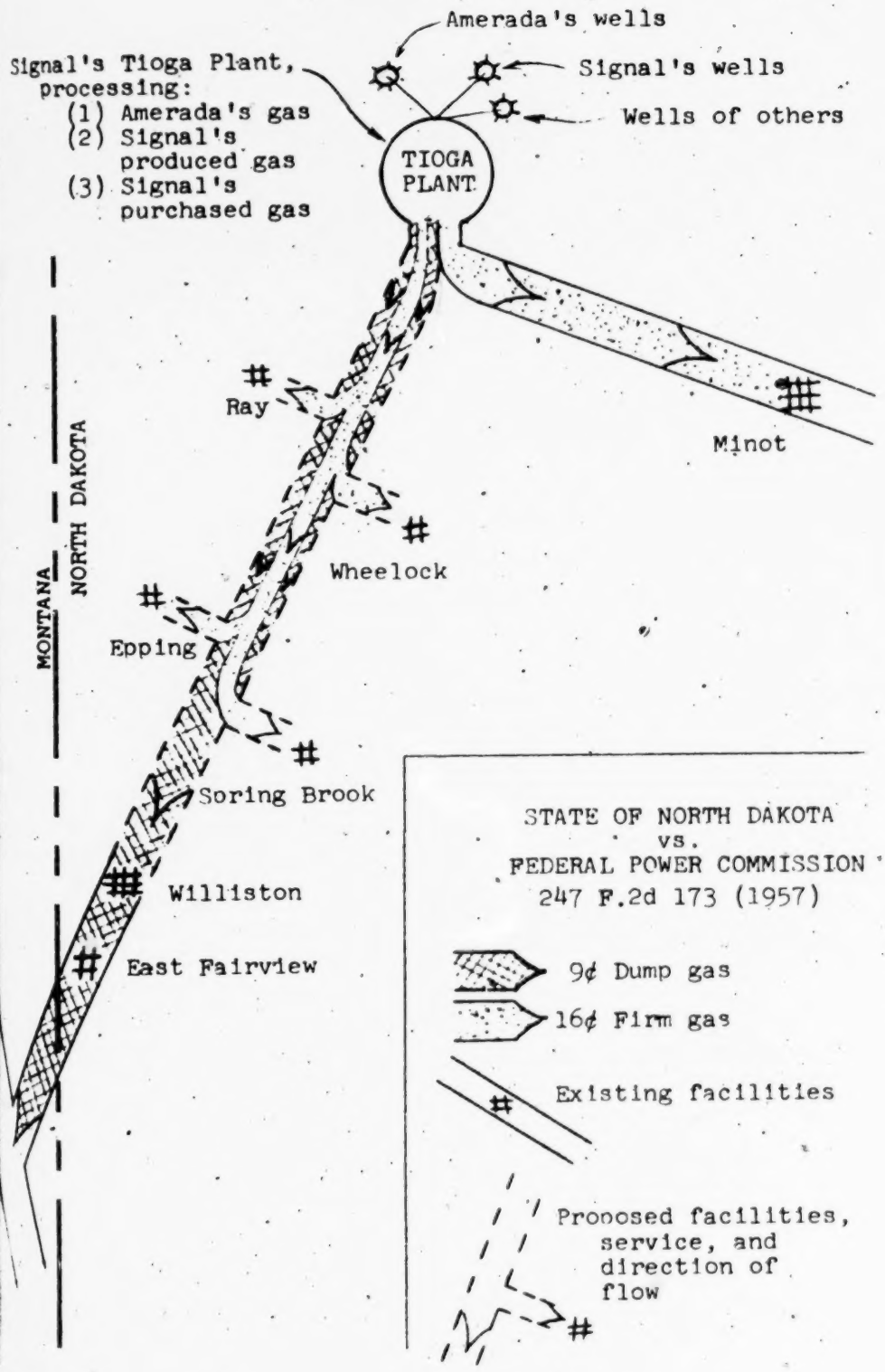
SUBSCRIBED AND SWORN To before me, a Notary Public, this 23rd day of December, 1960.

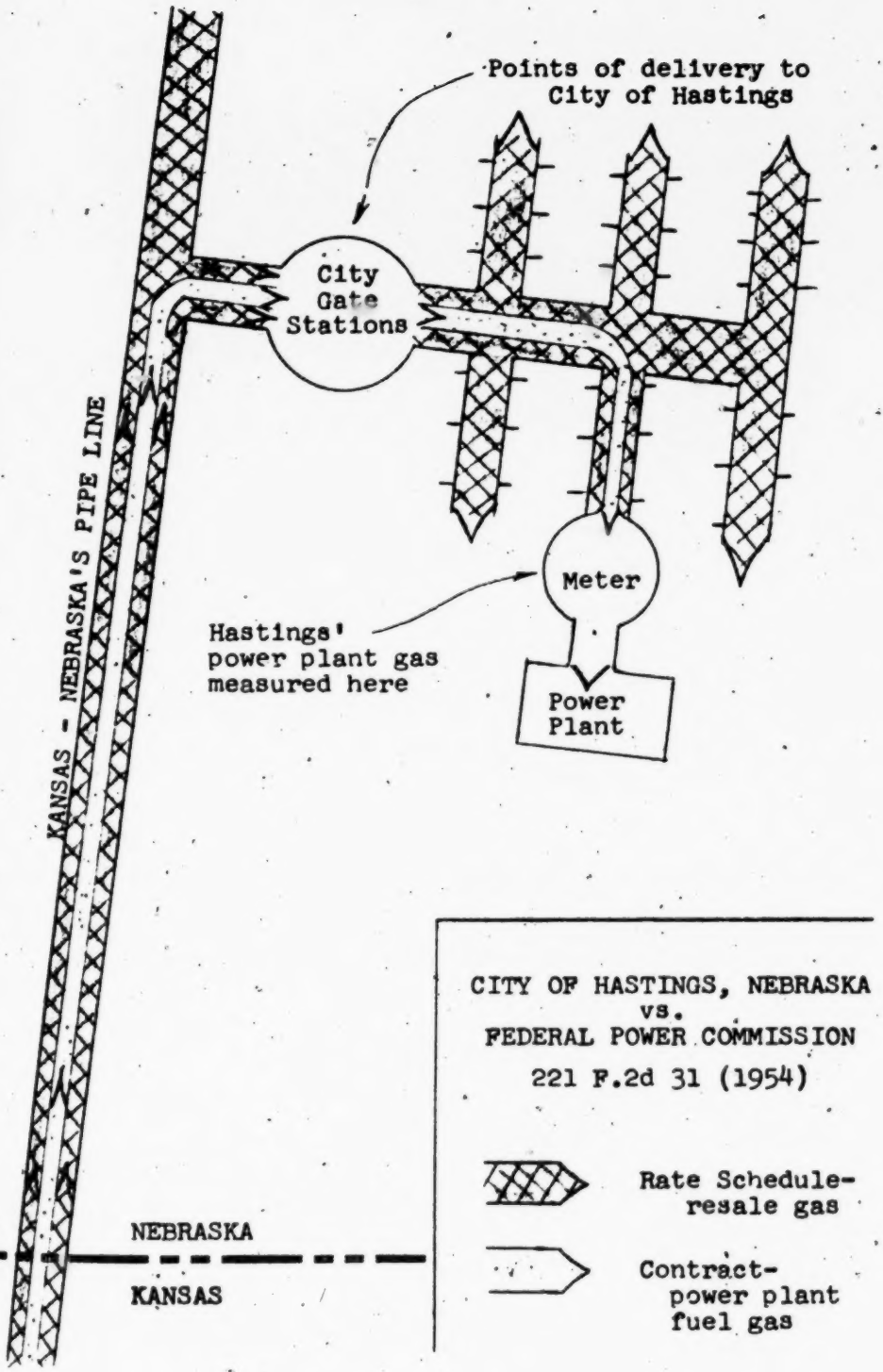
(S) MILDRED BITTNER
Notary Public in and for
Harris County, Texas

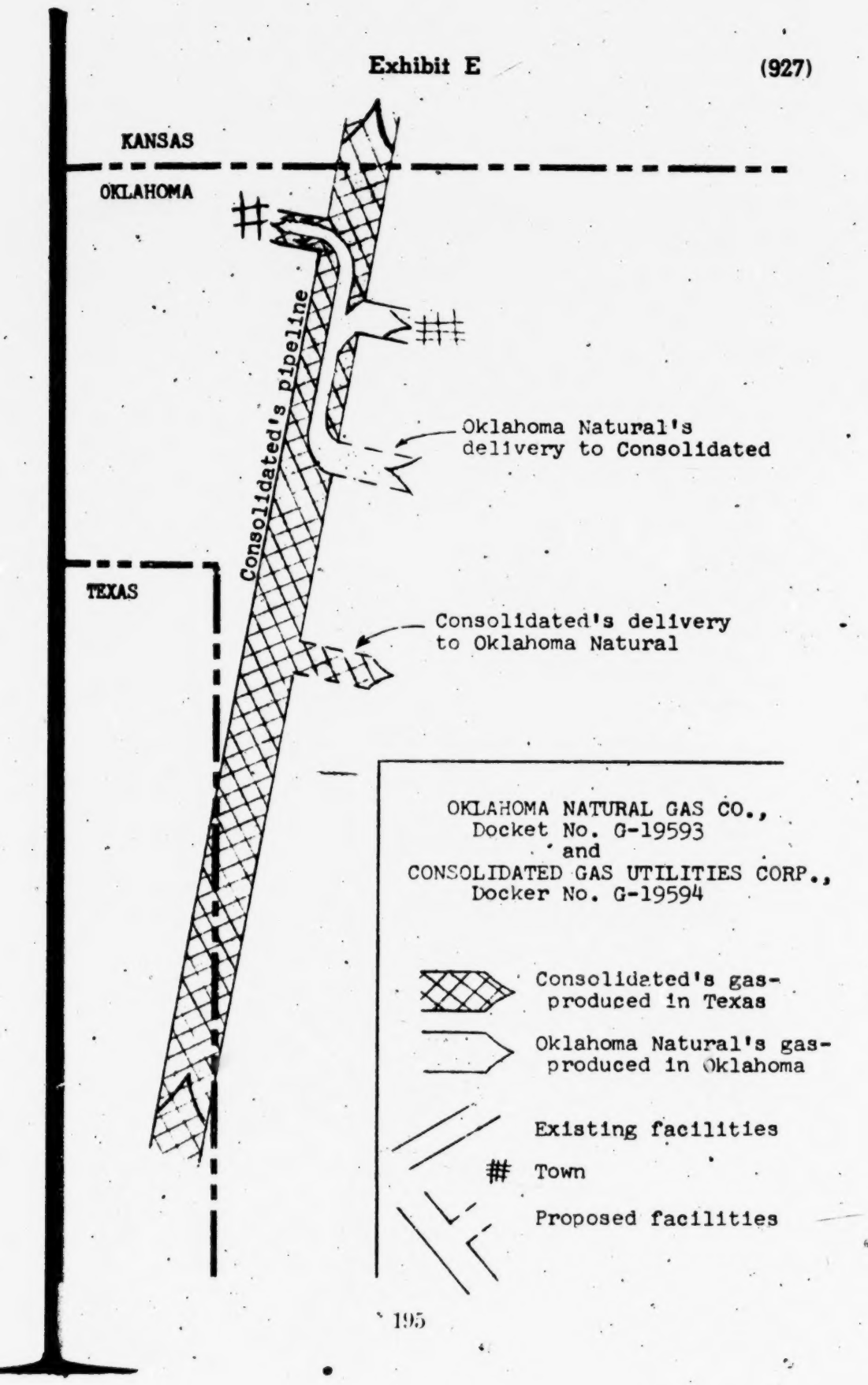
(SEAL)

924

[CERTIFICATE OF SERVICE]


Amerada's wells
Signal's wells
Wells of others
Signal's Tioga Plant, processing:
(1) Amerada's gas
(2) Signal's produced gas
(3) Signal's purchased gas
TIOGA PLANT
Ray
Minot
Wheelock
Epping
Soring Brook
Williston
East Fairview
MONTANA
NORTH DAKOTA
STATE OF NORTH DAKOTA
vs.
FEDERAL POWER COMMISSION
247 F.2d 173 (1957)
9¢ Dump gas
16¢ Firm gas
Existing facilities
Proposed facilities, service, and direction of flow


Points of delivery to City of Hastings
City Gate Stations
KANSAS - NEBRASKA'S PIPE LINE
Meter
Hastings' power plant gas measured here
Power Plant
CITY OF HASTINGS, NEBRASKA
vs.
FEDERAL POWER COMMISSION
221 F.2d 31 (1954)
Rate Schedule- resale gas
Contract- power plant fuel gas
NEBRASKA
KANSAS


KANSAS
OKLAHOMA
TEXAS
Consolidated's pipeline
Oklahoma Natural's delivery to Consolidated
Consolidated's delivery to Oklahoma Natural
OKLAHOMA NATURAL GAS CO., Docket No. G-19593 and CONSOLIDATED GAS UTILITIES CORP., Docker No. G-19594
Consolidated's gas-produced in Texas
Oklahoma Natural's gas-produced in Oklahoma
Existing facilities
Town
Proposed facilities

938

(Received Feb. 27, 1961)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

In the Matter of

Docket No. CP61-177

HOUSTON PIPE LINE COMPANY

Notice of Intervention of the People of the State of California and the Public Utilities Commission of the State of California

The People of the State of California and the Public Utilities Commission of the State of California (California Commission) hereby file notice of intervention in the above-entitled proceedings pursuant to the provisions of Section 15(a) of the Natural Gas Act and the provisions of Section 1.8 of the Rules of Practice and Procedure of the Federal Power Commission and as grounds for such notice respectfully show:

I.

The Attorney for the Public Utilities Commission of the State of California is empowered under Section 307 of the California Public Utilities Code to represent and appear for the People of the State of California and the California Commission in proceedings of this character. The California Commission, pursuant to the constitutional and statutory provisions creating it, has jurisdiction, among other things,

939

to regulate rates and charges for the sale of natural gas by public utilities operating within California to consumers within this State (California Constitution, Article

(939)

XII, Sections 22 and 23; California Public Utilities Code, Sections 216 and 494,

II.

Approximately 75% of the natural gas consumed by customers of the public utility gas distribution companies in California is purchased from El Paso Natural Gas Company (El Paso). Furthermore, approximately two-thirds of the natural gas sold by El Paso is consumed in the State of Califorina. In its most recent tariff filing in Docket No. RP60-3, El Paso cited as one of the reasons for its need for increased rates the increased cost of gas supplied to it. It follows that such increased cost causes an increase in the rates and charges of such gas distribution companies, which in turn results in an increased cost of gas to the California consumers. Likewise, any increase in El Paso's other costs of operation, such as the costs of its compressor fuel, will also cause increases in the rates and charges of such gas distribution companies, which in turn will result in an increased cost of gas to the California consumers.

940

III.

In the above-entitled proceeding Houston Pipe Line Company (Houston) seeks a declaration that the proposed sale of gas to El Paso is not subject to Federal Power Commission jurisdiction since the purchase agreement requires that all natural gas purchased thereunder be used solely for fuel in El Paso's compressors and other installations situated wholly in the State of Texas. El Paso has applied for certificate authority to construct and operate certain natural gas pipeline facilities incident to the acquisition and use of this gas from Houston in Docket No. CP61-26. California has intervened in that proceeding because the prices which El Paso agreed to pay Houston

(and others there involved) were substantially higher than prices elsewhere on its system. These increased prices which El Paso pays for compressor fuel will be included in its cost of service and, like increases in the price of gas for resale, will ultimately be passed on to California consumers.

Houston's petition in this proceeding (CP61-177) raises a question which will affect the outcome of matters before the Commission in Docket Nos. CP61-26, CP60-101, CI60-693 in which California is an intervenor. In addition, the concept presented by these applications, that earmarking certain gas supplies for a pipeline's own use and declaring that gas

so designated is non-jurisdictional makes it so in fact, represents a practice which, if allowed, will have a substantial impact upon the ultimate price of gas delivered to California.

IV.

The California Commission submits, under the facts above stated, that the outcome of these proceedings can and will have an important and direct effect on the natural gas consumers in the State of California. The interests of these consumers are best represented through the People of the State of California and the California Commission. It is respectfully submitted that the interests of the People of the State of California and the California Commission are separate from and independent of other parties to these proceedings, and for these reasons the People of the State of California and the California Commission should be allowed to intervene in these proceedings.

V.

The names, titles, and post office addresses of the persons to whom communications are to be addressed are:

William M. Bennett, *Chief Counsel*
J. Calvin Simpson, *Associate Counsel*
Walter G. Linstedt, *Counsel*
514 State Building
San Francisco 2, California

942

Randolph J. Pajalich, *Secretary*
California Public Utilities Commission
521 State Building
San Francisco 2, California

Respectfully submitted,

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

By /s/ WILLIAM M. BENNETT
William M. Bennett
Chief Counsel

/s/ J. CALVIN SIMPSON
J. Calvin Simpson
Associate Counsel

/s/ WALTER G. LINSTEDT
Walter G. Linstedt
Counsel

Dated: February 21, 1961.

946

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Frederick Stueck, Arthur Kline and Paul A. Sweeney.

Docket No. CI60-693
LO-VACA GATHERING CO.

Docket No. CP61-177
HOUSTON PIPELINE COMPANY

Order for Hearing and Consolidating Proceedings

(Issued February 24, 1961)

Lo-Vaca Gathering Co., Corpus Christi, Texas, filed on June 1, 1960, pursuant to Section 7 (c) of the Natural Gas Act, an application for a certificate of public convenience and necessity authorizing the sale in interstate commerce for resale of up to 66,500,000 cubic feet of natural gas (@ 14.65 # psia) per day to El Paso Natural Gas Company, El Paso, Texas, and also an additional like volume of natural gas to be used by El Paso solely as fuel in its compressors and other facilities located outside Texas, all of such gas to be produced in Texas and sold at the initial price of 22¢ per Mcf.

Houston Pipe Line Company, Petroleum Building, Houston, Texas, filed on December 27, 1960, pursuant to Section 16 of the Act and Section 1.7(c) of the Commission's Rules of Practice and Procedure, a petition for a declaratory order to remove uncertainty as to the Commission's jurisdiction under the Natural Gas Act over a proposed sale by Houston to El Paso Natural Gas Company of up to 77,000,000 cubic feet per day of natural gas (@ 14.65 = psia) to be produced in Texas and delivered to El Paso at a point near Three Rivers, Live Oak County, Texas.

The contract between El Paso and Houston provides that the gas to be purchased thereunder, although commingled with other gas being transported in El Paso's pipe line, shall be used by El Paso solely as fuel in the operation of El Paso's facilities in Texas and in the gasoline plant of Phillips Petroleum Company in Ector County, Texas. The price will be determined according to a formula set out in the contract which would have produced a price of 19.5¢ for each one million BTUs delivered during the billing month of November, 1959. The contract provides that the gas sold thereunder shall have not less than 950 BTUs per cubic foot.

947

The Commission finds:

It is appropriate in carrying out the provisions of the Natural Gas Act that a public hearing be held, limited as hereinafter ordered, and that the proceedings be consolidated for hearing and disposal.

The Commission orders:

(A) A public hearing, limited to the question of the Commission's jurisdiction over the proposed sale of gas by Houston for use as fuel in El Paso's facilities in Texas and in Phillips' gasoline plant in Ector County, Texas, and over the proposed sale of gas by Lo Vaca for use as fuel in El Paso's facilities outside Texas, will be held in a hearing room of the Federal Power Commission, 441 G Street, N. W., Washington 25, D. C., commencing March 21, 1961, at 10:00 a.m. (EST).

(B) The proceedings under the docket numbers in the caption hereof are hereby consolidated for hearing and disposal.

(C) Notices and petitions to intervene and protests may be filed with the Commission in accordance with Sections

1.8 and 1.10 of the Commission's Rules of Practice and Procedure (18 CFR 1.8, 1.10) on or before March 3, 1961.

By the Commission. Commissioner Kline dissenting, filed a separate statement.

J. H. GUTRIDE
Joseph H. Gutride,
Secretary.

948

Docket No. CI60-693
LO-VACA GATHERING CO.

Docket No. CP61-177
HOUSTON PIPE LINE COMPANY

KLINE, Commissioner, *dissenting:*

I see no reason for setting this matter down for hearing. The facts are not in dispute and the question of whether or not we have jurisdiction has been thoroughly briefed by the parties. In my opinion these sales are clearly intrastate in character and the Commission has no jurisdiction over them and I favor entering a declaratory order to the effect that we have no jurisdiction. I can see no reason for a long protracted hearing on an issue where the facts are not in dispute and where the issue is the identical issue which has been ruled upon by us several times in the past few years.

ARTHUR KLINE, *Commissioner*

994

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Decision

Docket No. CI60-693
LO-VACA GATHERING COMPANY

Docket No. CP61-177
HOUSTON PIPE LINE COMPANY

UPON APPLICATION AND PETITION TO DECLARE CERTAIN RESTRICTED-USE GAS CONTRACTS TO BE NONJURISDICTIONAL

(Issued August 11, 1961)

995

APPEARANCES

For Lo-Vaca Gathering Company
Jack Ware, Esquire, Corpus Christi, Texas
Bradford Ross, Esquire, Washington, D. C.
David I. Granger, Esquire, Washington, D. C.

For Houston Pipe Line Company
Hugh Q. Buck, Esquire, Houston, Texas
Richard L. McGraw, Esquire, Houston, Texas
Jefferson D. Giller, Esquire, Houston, Texas

For Southern California Gas Company
Harry P. Letton, Jr., Esquire, Los Angeles, California
L. T. Rice, Esquire, Los Angeles, California
Henry F. Lippitt, Esquire, Los Angeles, California
John Ormasa, Esquire, Los Angeles, California

For Southern Counties Gas Company of California
Milford Springer, Esquire, Los Angeles, California
Robert M. Olson, Jr., Esquire, Los Angeles, California

For Pacific Gas and Electric Company
F. T. Searls, Esquire, San Francisco, California
Malcolm H. Furbush, Esquire, San Francisco, California

For California Public Utilities Commission
William M. Bennett, Esquire, San Francisco, California
William L. Cole, Esquire, San Francisco, California
Gerald A. Laster, Esquire, San Francisco, California

For Transwestern Pipeline Company
Raybourne Thompson, Esquire, Houston, Texas
J. Evans Attwell, Esquire, Houston, Texas

For El Paso Natural Gas Company and El Paso Gas Supply Company
Allen R. Grambling, Esquire, El Paso, Texas
George D. Horning, Jr., Esquire, Washington, D. C.

996

For the People of the State of California and California Public Utilities Commission
William M. Bennett, Esquire, San Francisco, California
J. Calvin Simpson, Esquire, San Francisco, California
Walter G. Linstedt, Esquire, San Francisco, California
Gerald A. Laster, Esquire, San Francisco, California

For Texaco, Inc.
Frank H. Strickler, Esquire, Washington, D. C.
Alfred C. DeCrane, Jr., Esquire, Houston, Texas
Paul F. Schlicher, Esquire, New York, New York

For the Staff of the Federal Power Commission
C. Louis Knight, Esquire, Washington, D. C.

A. Syliabi of Points Decided

1. The proposed sale and delivery in Texas of gas produced wholly in Texas, transported wholly in Texas, and consumed wholly in Texas will not become a sale in interstate commerce because it is to be moved in a commingled stream with other Texas-produced gas destined for interstate commerce, where the respective volumes of interstate and intrastate gas are metered and known and the intrastate gas is separated from the commingled stream before any of the stream containing the interstate gas leaves Texas.

2. The producer and gatherer of such wholly intrastate gas will not become a natural-gas company because of its intrastate sale and delivery of such gas to a natural gas pipeline for local fuel consumption.

3. The sale and delivery in Texas of gas produced wholly in Texas, but to be transported outside of Texas, in commingled stream with Texas and New Mexico gas destined for resale in interstate commerce for ultimate public consumption, and to be consumed outside of Texas will be a sale in interstate commerce because the gas will have entered the stream of interstate commerce and will have passed across the Texas border where some portion thereof will be resold to consumers outside of Texas despite the contractual obligation of the natural gas pipeline purchaser to draw from the stream an equal amount of gas for fuel in its compressor stations located beyond the Texas border.

4. The producer and gatherer of such gas destined for transportation and sale in interstate commerce will be a natural-gas company subject to the Natural Gas Act because of its interstate sale and delivery thereof to a natural gas pipeline company.

B. Introductory Statement

Freer, Presiding Examiner: This case involves the question as to the jurisdiction of the Federal Power Commission (Commission) under the Natural Gas Act (Act) over certain proposed sales and deliveries of natural gas to a natural-gas pipeline company, by two producers and/or gatherers thereof, at least one of them and the pipeline company being natural-gas companies subject to the jurisdiction of the Commission under the Act. The question arises out of an application filed by Lo-Vaca Gathering Company (Lo-Vaca) on June 1, 1960, in Docket No. CI60-693 for authority to sell and deliver natural gas to El Paso Natural Gas Company (El Paso) pursuant to the provisions of two certain contracts more particularly described below and a petition for a declaratory order pursuant to Section 16 of the Act filed by Houston Pipe Line Company (Houston) on December 27, 1960, in Docket No. CP61-177.

C. History of the Proceeding

1. The Filings on Which Hearing Was Held

(a) In the application filed by Lo-Vaca on June 1, 1960 (Item A), the applicant seeks authorization not only for the "gathering and sale" of natural gas (including construction of necessary facilities) pursuant to an admittedly jurisdictional (Tr. p. 24) contract entered into on May 16, 1960, but also, for the "gathering and delivery" of natural gas pursuant to a contract dated March 15, 1960, for El Paso's fuel consumption outside of Texas (Tr. p. 46), both by the Applicant and El Paso Natural Gas Company and as more particularly hereinafter described.

(b) In the petition filed by Houston on December 27, 1960, pursuant to Section 16 of the Act, the petitioner seeks

(997)

a declaratory order to remove uncertainty as to the Commission's jurisdiction over its proposed sale and delivery of natural gas to El Paso for El Paso's fuel consumption in Texas pursuant to a contract entered into on July 1960 (Ex. 2), as more particularly hereinafter described.[1]

998

On February 24, 1960, the Commission issued an order consolidating and setting down for hearing the application and petition above described and limiting the hearing (and disposition) to the question of the jurisdiction of the Commission over the sales and deliveries described in the said restricted-use (fuel consumption) contracts of March 15, 1960, and July 29, 1960, respectively.[2]

II. The Filings in Related Pending Proceedings

(a) There is pending before the Commission an application by El Paso Gas Supply Company[3] (Supply), a wholly-owned subsidiary of El Paso, filed with the Commission on May 13, 1960, in Docket No. CP60-101, for a certificate of public convenience and necessity authorizing it to construct and operate a natural gas transmission system for transportation of the gas to be received from Lo-Vaca and Houston near Three Rivers in Live Oak County, Texas, for El Paso, which after compression is to be transported through 227.6 miles of proposed 30" pipeline from there to

---

[1] On Ex. 1, a "System Map, Houston Pipe Line Company" is shown the construction contemplated by Houston and El Paso Supply Company in connection with Houston's sale and delivery of gas to El Paso. (Tr. pp. 106-7.

[2] Commissioner Kline, dissenting, stated that in his opinion no hearing was necessary and that he favored an order holding the sales to be intrastate and not within the Commission's jurisdiction.

[3] Supply's petition for intervention herein was denied March 30, 1961, on the ground that its and El Paso's interests both would be protected by El Paso's intervention, which had been granted on March 15, 1961.

a connection with El Paso's Sonora Plant in Sutton County, Texas (Exs. 5-A, 6, 7, 8, 9, 10; Item D). Under contractual arrangements not yet completed, El Paso will sell to Supply sufficient Houston gas to fuel and operate the facilities proposed to be constructed and operated by Supply. (Tr. pp. 268-69; Ex. 7; Item D, Sch. 1.)

III. The Interventions

Petitions to intervene filed by El Paso, Pacific, Southern California Gas Company and Southern Counties Gas Company of California (California Distributors), Transwestern Pipe Line Company (Transwestern), The People of the State of California and Public Utilities Commission of the State of California (California), were granted by order of March 15, 1961, and these intervenors participated in the hearings.[4]

Other petitions in intervene, filed by Supply and Texas, were denied by order of March 30, 1961; prior to said order, however, the privilege of limited participation had been allowed to these companies. (Tr. pp. 4, 7.)

IV. The Hearings

Pursuant to the Commission's Order for Hearing and Consolidating Proceedings, issued February 24, 1961, a public hearing before the undersigned hearing examiner was convened on March 21, 1961, and sessions were held also on March 22 and April 10, 1961.

Opportunity to file briefs was afforded all parties, and opening and reply briefs favoring exemption from jurisdiction were filed by Lo-Vaca, Houston and El Paso; the Staff, California and California Distributors (other than Pacific) filed briefs in opposition to exemption. In

[4] Pacific and Transwestern, while represented by Counsel at the hearings, neither cross-examined witnesses, nor offered evidence nor filed briefs.

all, 242 pages of briefs were filed, 89 pages for exemption and 153 pages in opposition.

D. The Issues

I. Limitation of Issues by Order of February 24, 1961

The Commission's Order for Hearing and Consolidating Proceedings, issued February 24, 1961, provided in pertinent part:

> "(A) A public hearing, limited to the question of the Commission's jurisdiction over the proposed sale of gas by Houston for use as fuel in El Paso's facilities in Texas and in Phillips' gasoline plant in Ector County, Texas, and over the proposed sale of gas by Lo-Vaca for use as fuel in El Paso's facilities outside Texas, will be held . . .
>
> "(B) The proceedings under the docket numbers in the caption hereof hereby consolidated for hearing and disposal."

The issues are whether Lo-Vaca's and Houston's proposed sales and deliveries of gas to El Paso under the contracts of March 15, 1960, and July 29, 1960, are subject to the jurisdiction of the Commission or whether such proposed sales and deliveries of either of them are exempt therefrom by reason of the provisions of the restricted-use contracts employed in making them. Since there is general agreement among the parties and the witnesses that some part of the gas proposed to be

1000

sold and delivered for fuel consumption in Texas[5] as well as a part of that proposed to be sold and delivered by

[5] El Paso's Reply Brief, p. 2, for example, states: "El Paso's argument . . . assumes that some of the molecules of the Houston gas will pass outside of Texas." (Cf. Tr. pp. 332, 343-44.)

Lo-Vaca for fuel consumption outside of Texas, inevitably would be *physically* transported in interstate commerce for resale in interstate commerce by El Paso for ultimate consumpiton in California, any exemption found for these sales, or either of them, must be rested on those provisions of the contracts which seek to avoid jurisdiction.

II. Contentions of the Parties

(a) Lo-Vaca's position (Initial Brief, pp. 3-5) is as follows:

> ". . . The sale is a direct sale to El Paso for its use in its own facilities, and as such, is not within the Commission's jurisdiction . . . direct sales of natural gas being other than sales for resale, are not within the Federal Power Commission's jurisdiction under the Natural Gas Act . . ."
>
> • • • • •
>
> "Lo-Vaca's gas . . . will be commingled in El Paso's interstate pipeline, in order to transport it to the facilities where it will be consumed. However, the fact that natural gas which is the subject of a non-jurisdictional direct sale is transported in a commingled state with natural gas which is being sold in interstate commerce for resale and thus jurisdictional does not cause the non-jurisdictional character of the former sale to be lost where the non-jurisdictional sale takes place in a separate and distinguishable form . . ."

(b) Houston's position is stated in its Reply Brief (pp. 4-5) as follows:

> "Houston's position is: *A sale of gas, even for resale, with a contractual obligation that it be consumed in the state of production is not jurisdictional even*

though the gas be commingled with gas which has not yet but eventually will be transported beyond the state of production." (Emphasis supplied by Houston.)

1001

(c) El Paso's position is "that the restricted use contracts are non-jurisdictional" (Initial Brief, p. 3), which position is amplified in its Reply Brief (p. 2) as follows:

> ". . . there is no dispute . . . that 'following commingling, one cannot either prove or disprove that a particular molecule of gas was so employed [as fuel] or remained in the commingled stream (R. 344)' . . . [and] (R. 332, 343) that there is no assurance that the specific molecules of gas sold to El Paso by either Houston or Lo-Vaca will be consumed as fuel in El Paso's compressor stations . . . the case law unequivocally holds that preservation of the separate molecular identiy of certain purchased gas throughout its transportation is not essential to a determination that it remains in *intrastate* commerce although it becomes a part of a commingled stream, the rest of which may be in *interstate* commerce . . ."

Particularly so (Reply Brief p. 2) with respect to the Houston gas:

> ". . . extraction of the gas of Houston as such is *not* essential to the consumption of the gas of Houston solely as fuel in Texas in any meaningful legal sense . . ." (Emphasis supplied by El Paso.)

(d) The Commission Staff states "the principal legal question presented (Brief, p. 1) to be:

> ". . . whether a seller and a buyer of natural gas can prevent, by contract, sales of natural gas from

being subject to FPC jurisdiction when the gas flows in continuous movement from State to State, commingled with gas from other sources, with gas from the commingled stream being resold for ultimate public consumption."

Staff's contentions as to this question are stated in its brief (pp. 11-12), as follows:

". . . the sales of gas proposed by Lo-Vaca and Houston will be sales in interstate commerce for resale and, therefore, they will be subject to FPC jurisdiction. Lo-Vaca and Houston, however, contend that the contract provisions, . . . limiting the use of gas will prevent the sales made under their said contracts with El Paso . . . from being sales in interstate commerce for resale and will forestall FPC jurisdiction. They do not claim that, absent such contractual limitations on use, their gas sales would

not be in interstate commerce for resale and would not be subject to FPC jurisdiction. To the contrary, the avowed purpose of including in their contracts the limitations on use of gas was to circumvent jurisdiction."

(e) California's position, so far as it is pertinent to the limited issue herein presented (*infra*, footnote No. 10), is stated in its brief under "Conclusions" (pp. 12-13), as follows:

". . . in addition to the fact that some of the gas will mix with out-of-state gas prior to use even under the best conditions, *it is impossible to assure that the gas purchased will be used as specified, and some, necessarily, will be transported out-of-state and resold.*

> "It is likewise obvious that both 'restricted' and 'unrestricted' gas will be used interchangeably. When intake of one is cut down, the other will increase, and *vice versa*. Complete integration in supply is not only likely, but essential. El Paso's system requirements demand it." (Emphasis supplied by California.)

(f) California Distributors (other than Pacific) state their concept of the issues in their joint brief (p. 18) as follows:

> "The basic issue to be determined in this jurisdictional proceeding is whether the jurisdiction of the Federal Power Commission depends upon the actual flow of a commingled supply of natural gas in interstate commerce, or whether the question of jurisdiction is determined by whether a contract provides for the use of this commingled gas for nonjurisdictional purposes although physically, regardless of the contractual provision, the commingled gas must flow in interstate commerce. Stated in another fashion, the issue is as to whether the jurisdiction of this Commission is dependent upon fact rather than fiction, upon *actual flow* rather than upon *contractual flow*." (Emphasis supplied by California Distributors.)

Their conclusion as to the interstate nature of the transactions is stated in said joint brief (p. 32) as follows:

> "From the moment that Houston and Lo-Vaca gas is received into the El Paso interstate pipeline system at Three Rivers, Texas, such gas will form a portion of a commingled supply of gas flowing in interstate commerce . . ." (Cf. Exhibit A to said brief.)

1003

E. The Facts in Evidence

I. Corporate Status and Present Operations

(a) *Lo-Vaca* is a Texas corporation with its principal place of business in Corpus Christi, Texas (Item A). It "was organized to purchase, gather and deliver gas to El Paso" with which it has two contracts, executed on March 15, and May 16, 1960, respectively.[6] (Tr. p. 8.)

Lo-Vaca owns no facilities and engages in no operations; its operations including the proposed deliveries to El Paso will take place only when the facilities proposed to be constructed by Supply (Docket CP60-10) and by Lo-Vaca (Docket CI60-693) are authorized and completed.

(b) *Houston* is a Texas corporation having its principal offices in Houston, Texas (Petition p. 1). It is a wholly-owned subsidiary of Houston Natural Gas Corporation, which (like Houston) has been engaged for some years in a wholly intrastate business (Tr. pp. 104, 106).

Since 1925 Houston has engaged in the purchase, transportation and sale of natural gas within the State of Texas (Tr. p. 104). Currently, it delivers about 500,000 Mcf daily to local distribution companies for resale for consumption in various Texas communities and to industrial and commercial consumers located in the Texas Gulf Coast (Ex. 1) area. Many of its purchase contracts contain a jurisdictional escape clause. (Ex. 4; Tr. pp. 15, 109, 111, 128-129.)

There are no present deliveries of Houston gas to El Paso. Deliveries are not physically possible until com-

[6] The May 16 contract is admittedly subject to the Commission's jurisdiction (Tr. pp. 21-24); but the March 15 contract is claimed to be exempt, because the gas is to be used by El Paso solely as fuel in El Paso's compressors and other facilities outside of Texas, enroute to which said gas will be commingled with other gas being transported in El Paso's pipeline system (Tr. pp. 8-9).

pletion of construction by Houston and Supply; and they are not contractually possible until and unless the Commission declares that Houston's contract with El Paso "is a non-jurisdictional transaction." (Tr. p. 16; Ex. 2, p. 6.)

II. The Gas Sales Contracts

(a) *Lo-Vaca—El Paso jurisdictional contract of May 16, 1960.* By this admittedly jurisdictional (Tr. p. 24) contract,[7] Lo-Vaca agrees

to sell and deliver 50,000 Mcf[8] average per day (at 14.65# psia) of natural gas to El Paso at or near Three Rivers, Texas, at which delivery point title thereto vests in El Paso. The contract, which is free of all restrictions upon interstate transportation and resale in interstate commerice by El Paso (Tr. pp. 8, 21-24), is for 20 years at an initial price of 22¢ per Mcf, plus certain taxes, and escalating to 26¢. El Paso agrees to "take or pay" for certain minimum volumes, and Lo-Vaca agrees to dedicate reserves in the Texas Gulf Coast area to the performance of the contract.

(b) *Lo-Vaca—El Paso restricted use contract of March 15, 1960*—This contract is substantially identical with the May 16 jurisdictional one, being likewise for 20 years for like volumes at like pressure and like prices and with like take-or-pay provisions and like dedication of reserves.

---

[7] This sale of gas for which Lo-Vaca seeks a certificate of convenience and necessity, is herein involved only because of its effect on El Paso's task of separating this jurisdictional gas from the Lo-Vaca restricted use gas to be delivered to El Paso in a commingled stream with it and with Houston's restricted-use gas.

[8] Letter agreement (Ex. 11) has been negotiated to increase this quantity to 80,000 Mcf. (Tr. pp. 207-08, 213-16.)

The important difference is that, in addition to the employment therein of the words "gathering and delivery," in lieu of the "gathering and sale" appearing in the May 16 contract, this contract provides in Article X, Section 2:

> "It is the intent and understanding of the parties hereto that the sale of natural gas hereof is not subject to the jurisdiction of the Federal Power Commission because this sale is not for resale."

Also, in Article XVI it is provided that—

> "All of the gas to be purchased by El Paso from Gatherer under this agreement shall be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps, and other facilities located outside of the State of Texas. It is understood, however, that said gas will be commingled with other gas being transported in El Paso's pipe line system."

By letter filed with the Commission on November 25, 1960 (Tr. pp. 23-24), Lo-Vaca states its intention to deliver the contractual quantities under both contracts, reserving its right to contest with respect to jurisdiction over the sales of the restricted use gas. (Tr. p. 9.)

(c) *Houston-El Paso restricted use contract of July 19, 1960*—Reciting El Paso's desire to purchase gas for consumption in Texas as fuel in its facilities and in the operation of Phillips' gasoline plant in Ector County, Texas, this contract for 70,000 Mcf per day is for

20 years, subject to earlier termination. As with the Lo-Vaca contract, this gas is to be delivered by Houston to Supply (for El Paso) at or near Three Rivers, Live Oak County, Texas, and El Paso will take title thereto at said

point of delivery. Sales are to be on an interruptible basis (Article XV). The price is to be determined according to a formula which, if applied for the billing month of November 1959, would have produced a price of 19.5¢ plus certain taxes for each unit of one million BTU. The gas to be of not less than 950 BTU per cubic foot.) El Paso agrees to pay for the 1,000 Mcf per day if available whether or not taken.

Restriction on the use of the gas is stated in Article II as follows:

> "2.1 . . . Accordingly, it is recognized that any gas purchased hereunder from Houston for such fuel consumption within Texas must necessarily be commingled with other gas being transported by El Paso in its pipe line system. In this connection, El Paso represents and covenants that gas to be purchased by El Paso from Houston hereunder shall be used and consumed by El Paso solely as fuel in the operation of El Paso's plant and in the gasoline plant of Phillips Petroleum Company in Ector County, all located wholly within the State of Texas. El Paso shall advise Houston as to each such utilization to be made of the gas purchased hereunder, and no new or different utilization of such gas shall be made by El Paso without the prior written consent of Houston. El Paso further covenants and agrees that at no time during the term of this agreement will El Paso take from Houston a quantity of gas in excess of the quantity of gas being consumed at the same time in Texas by El Paso for uses agreed to hereunder by Houston. If, by inadvertence or mistake or for any other reason, El Paso shall at any time during the term hereof take from Houston hereunder a greater quantity of gas than is being so utilized, El Paso covenants that the same shall be sold or utilized

by El Paso solely in intrastate commerce for use and consumption within the State of Texas.

"2.2 El Paso covenants that all components of El Paso's plant consuming fuel gas hereunder shall physically be located on its system of pipe lines and laterals within the State of Texas through which the flow of gas, although commingled with other gas, shall at all times be continuous and downstream from the originating delivery point defined hereunder. A sufficient volume of the commingled stream of gas shall by said physical connections reach and pass into

components of El Paso's plant located in Texas which consume in the aggregate a volume of gas as fuel equal to or greater than the volume of gas contributed into the commingled stream at Three Rivers by Houston. . . ."

III. The Proposed Operations and Flow of Gas.

(a) *Lo-Vaca*—Under both the unrestricted and restricted use contracts, gas will be produced and/or gathered by Lo-Vaca at wellheads in the field (in Texas, Tr. pp. 24-26) and delivered (for El Paso) by Lo-Vaca in a commingled stream (Tr. pp. 266-67), to Supply's proposed Coquat Compressor Station at or near Three Rivers, Live Oak County, Texas.

(b) *Houston*—The Houston gas will be gathered by Houston at well-heads in the field (in Texas, Tr. p. 104), and delivered (for El Paso to Supply's proposed Coquat Compressor Station at or near Three Rivers, Texas, for transportation by Supply to El Paso at Sonora, Texas. At that station, Houston's gas will be commingled with the commingled stream of Lo-Vaca gas (Tr. pp. 266-68).

(c) *Supply*—Houston's gas will be separately metered before it is commingled at Coquat Station with Lo-Vaca gas (Tr. p. 268) for transportation by Supply in a commingled stream with Lo-Vaca gas (including Lo-Vaca's admittedly interstate gas) through 227.6 miles of 30" pipeline which Supply proposes to construct and operate (Docket CP60-101) from Three Rivers to El Paso's Sonora Plant in Sutton County, Texas (Tr. p. 271; Exs. 5-A, 6, 7, 8, 9, 10; Item D). Under arrangements to be made with El Paso (Tr. p. 269), Supply will use some of this gas (about 1,460 Mcf per day—at 14.73# pb.) to operate its said Coquat Station at Three Rivers and its said transmission line from there to Sonora (Tr. p. 268; Ex. 7; Item D, Sch. 1).

(d) *El Paso*—Assuming Commission authorization therefor (Docket CP61-26), and the completion of Lo-Vaca's and Supply's proposed facilities and of its own new fuel lines and other necessary facilities (Tr. p. 135), El Paso proposes to route the commingled stream of Lo-Vaca and Houston gas (supplemented by additions to that stream at certain other points on its system, Tr. pp. 271, 282; 289-90, 307-8; Item B) to its fuel-consuming compressor stations located downstream of Sonora (Tr. p. 157, Ex. 7, 8), and at said stations to extract from the said commingled stream in the aggregate quantities of gas for such use equal to or greater than those it has agreed with Houston to extract and use

in Texas and with Lo-Vaca to extract and use beyond Texas.[9] Flow diagrams and maps for such plant fuel use

[9] By contract, Lo-Vaca's gas is to be transported and used by El Paso outside of Texas. El Paso concedes that some of Houston's gas likewise physically will pass outside of Texas, stating (Reply Brief, p. 2), "there is no dispute that 'following commingling, one cannot either prove or disprove that a particular molecule of gas was so employed [as fuel] or remained in the commingled stream (R. 344).'" (Cf. also Tr. p. 282 and Ex. 10.)

on an average demand day and a maximum demand day and the detailed oral testimony of El Paso's chief pipeline engineer fully illustrate El Paso's proposed fuel line construction and the quantities of fuel gas thereafter to be metered and withdrawn physically at these stations downstream of Sonora from the commingled stream containing the Lo-Vaca and Houston gas in accordance with its agreement to use such gas as fuel. (Lo-Vaca's outside of Texas and Houston's entirely in Texas.) (Exs. 5-A, 7, 8, 9, 10; and see also Map Ex. 6 and Hr. pp. 285-88: Items B and D.)

F. Discussion

I. The Statutes

Three sections of the Act warrant discussion. Section 7(c) provides, in pertinent part:

> "No . . . person which will be a natural-gas company upon completion of any proposed construction . . . shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction . . . of any facilities therefor, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations . . ."

Section 2(6) defines a "natural-gas company" to mean "a person engaged in the transportation of natural gas in interstate commerce or the sale in interstate commerce of such gas for resale."

Section 2(7) defines "interstate commerce" to mean "commerce between any point in a State and any point outside thereof . . ."

Most important is the scope of the Commission's jurisdiction under the Act.

Section 1(b) provides in pertinent part:

> "The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural-gas for resale for ultimate public consumption for domestic, ... or any other use, and to natural gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas . . ."

Lo-Vaca concedes that it will be a natural-gas company when it engages in the sales and deliveries of gas proposed to be made to El Paso under the unrestricted May 16, 1960, contract, and it seeks authorization therefor (Docket CI60-693). It intends also to make the sales and deliveries proposed to be made under the March 15, 1960, restricted-use contract whether or not such sales are held to be likewise subject to its jurisdiction (Tr. pp. 9, 23-24), reserving its right to contest any determination of jurisdiction over the sales of the restricted use gas.

Houston, on the other hand, seeks no authorization for its proposed construction and restricted-use sales and deliveries to El Paso, and does not intend to carry out its contract if its proposed sales and deliveries are found to be subject to the jurisdiction of the Commission. (Tr. p. 16 and Ex. 2, p. 6.)

Section 1(b) and the applicable cases interpreting said section are thus determinative of the question the Commission's jurisdiction over Lo-Vaca's and Houston's proposed sales and deliveries under the restricted-use contracts, or either of them. In this connection, Lo-Vaca contends that its restricted-use contract is for a direct sale (not a sale for resale); Houston contends that its restricted-use sale

not only is likewise a direct sale but also that it is purely an intrastate sale. Both claim exemption for these contracts under various court and commission cases which have construed Section 1(b),—primarily relying upon *State of North Dakota* v. *F.P.C.*, 247 F. 2d 173.

The staff contends that Houston's sale and delivery as well as those of Lo-Vaca will be in interstate commerce and for resale.

California contends that since "all the gas [Houston's and Lo-Vaca's] will be transported in a commingled stream with other Texas-produced gas which is admittedly jurisdictional . . . any restriction is a contractual

1009

one, not physical. (R. 200-1);" also that El Paso's proposal for carrying out its contractual obligation "is *incapable* of meeting the stated objective of the contracts of use solely as fuel and within or without Texas."[10]

The California Distributors (other than Pacific) like the Staff and California consider the restricted use contracts as "a subterfuge to escape regulation" (Brief, pp. 7-8) "because as a matter of physical fact, the gas [Houston's as well as Lo-Vaca's] must and does flow out of the State of Texas as part of the commingled stream and, in fact, a portion thereof does flow to California to be used for purposes of resale." To a considerable extent these intervenors and the Staff rely on *Oklahoma Natural Gas Co.*, 23 F.P.C. 291 and 531.

---

[10] Aside from the effects of "the fact of commingling," California urges, irrelevantly to the limited issues herein, that "since the volume purchased was based on a maximum day, and the facilities cannot use the whole of this volume on an *average* day, it follows that some of the 'restricted' gas *cannot physically* be used *'solely as fuel'* nor within the appropriate geographical area," particularly on *minimum* days. That issue, like those of price and public convenience and necessity, were postponed for later determination in the certificate proceedings (Tr. pp. 290-97).

(1009)

II. The Applicable Decisions

A large number of decisions by the Courts and the Commission are cited in the briefs of the parties, the same cases generally being cited by the opposing parties, but with differing interpretations of their holdings and/or the applicability thereof to the issues herein.

Controlling Decisions as to Houston Contract—A very recent decision by the Commission appears to be dispositive of the question of jurisdiction insofar as it relates to Houston.

This most recent decision of the Commission is its Order Modifying and Adopting the Initial Decision of Presiding Examiner, issued June 30, 1961, in *Shell Oil Company, et al.*, Dockets No. G-5029, *et al.* (24 FPC).

> ". . . we are unable to find any basis for concluding that we have jurisdiction over Shell's sale of gas to Columbian for the latter's Seminole carbon black plant . . .

1010

> Although neither the *North Dakota* nor the *Oklahoma Natural* cases, nor any of the cases cited by the parties are precisely in point, in its crucial facts the present case more closely resembles the circumstances of the first named than any of the others. Under Section 1(b) of the Act, we have jurisdiction over 'the sale in interstate commerce of natural gas for resale,' and 'the transportation of natural gas in interstate commerce.' Here we have a sale of gas produced wholly in Texas, transported wholly in Texas, and consumed wholly in Texas. This local gas is not commingled

[11] This decision was issued too recently to be mentioned in the briefs herein. The Presiding Examiner's Decision which was therein modified by the Commission was discussed in several briefs.

with any gas from outside the state, and all of it is separated from the commingled stream before any of the stream leaves the state . . . These facts which differentiate this case from the *Oklahoma Natural* case, provide no basis for a finding that this is a sale in interstate commerce."

The Commission's Order further states (p. 7):

". . . And although the gas for the Seminole plant is commingled with gas for El Paso destined for interstate commerce . . ., the respective volumes of interstate and intrastate gas are metered and known, and all the intrastate gas is separated from the commingled stream before any of the gas leaves Texas. Thus there is likewise lacking any basis for finding that the movement of the Seminole gas to its destination is transportation in interstate commerce."

The proposed sale by Houston, therefore, appears to be clearly an intrastate sale under the *Shell* case,—and the *North Dakota* case the "crucial facts" of which *Shell* closely resembles. Houston's proposed sale is not a sale for resale in interstate commerce.[12]

As in *Shell*, the Houston gas is to be "produced wholly in Texas, transported wholly in Texas, and consumed wholly in Texas."

Also, as in *Shell*, "[t]his local gas is not [to be] commingled with any gas from outside the state, and all of it is [to be] separated from the commingled stream [containing also Lo-Vaca gas destined to leave Texas] before any of the stream leaves the State." (Docket G-5029, *et al.*)

[12] Except for the gas to be resold to fulfill fuel requirements of Supply in Texas and those of Phillips' gasoline plant in Ector County, Texas, it is not a sale for resale in *intrastate* commerce. (Tr. pp. 141, 269.)

Likewise, under the *Shell* and *North Dakota* cases, the proposed movement of Houston's gas appears to be clearly intrastate, since the volumes of Houston gas "are [to be] separated from commingled stream before any of the gas leaves Texas." (*Shell* Order p. 7.)

Controlling Decision as to Lo-Vaca Contract—Lo-Vaca's restricted-use gas, on the other hand, is to be transported outside of Texas for use as compressor station fuel beyond the borders of that state. The proposed movement will be "transportation of natural gas in interstate commerce," and, therefore, subject to the Commission's jurisdiction.

Despite Lo-Vaca's contentions that its proposed restricted-use contract is not a sale for resale, it appears that such contract itself also may be subject to jurisdiction, as a "sale in interstate commerce of natural gas for resale," under authority of *Oklahoma Natural Gas Company, et al.*, 23 F.P.C. 291, and Order Denying Rehearing, 23 F.P.C. 531,—a case in which the "crucial facts" are similar.

Since the *Oklahoma Natural* case is so closely in point as to appear to be dispositive of the question of our jurisdiction over Lo-Vaca, liberal quotation therefrom is herein made.

In the original decision, the Commission stated:

> ". . . Consolidated in transporting gas from Texas for sale in Oklahoma and Kansas is a 'natural-gas' company . . : Oklahoma Natural's gas is, of course, commingled with Consolidated's gas in the pipeline. While Consolidated, . . . proposed to sell and deliver for consumption in Oklahoma an amount of this commingled gas that is at all times in excess of the amount of gas delivered by Oklahoma Natural, it is inevitable

that some of Oklahoma Natural's gas commingled with Consolidated's gas will be physically transported out of Oklahoma for consumption outside the state . . ." (23 F.P.C. 291, 292-93.)

Concerning the contractual provisions the Commission said:

"The exchange agreement provides: 'Consolidated further agrees that all of the volumes of gas delivered by Oklahoma Natural to Consolidated hereunder will be used and consumed only within the State of Oklahoma and that such volumes of gas will, under no circumstances, be transported by Consolidated in interstate commerce or resold for transportation and/or resale in interstate

commerce. It is understood, however, that . . . before any portion of the gas stream has left the State of Oklahoma it will be metered and determined that the volumes of gas metered and sold by Consolidated in its Northern Oklahoma system are at all times more than the volumes of gas being delivered to it by Oklahoma Natural.' " (23 F.P.C. 291, 293.)

The Commission's conclusions were:

"In our opinion the provision in the exchange agreement does not prevent Oklahoma Natural from being a natural-gas company within the meaning of the Act. Section 2(c) of the Act defines a 'natural-gas company' as 'a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.' 'Interstate commerce' is defined in part to mean 'commerce between any point in a State and any point outside thereof.' Interstate commerce has taken place here because

Oklahoma Natural has delivered gas which is transported outside the state and consumed outside it. *Interstate Gas Co.* v. *F.P.C.*, 331 U.S. 682, 687-689. This gas has entered the stream of interstate commerce, and has passed across the state border. As was said in *Deep South Oil Co.* v. *F.P.C.*, 247 F. 2d 882, 888 (CA5) 'The inescapable fact here then is that at least some portion of the gas sold by petitioner is resold to consumers outside the State of Texas. Consequently there can be no question that petitioner is making sales for resale within the meaning of the Act.' The fact that the contracting parties agree that Consolidated will deliver to its Oklahoma customers a greater amount of gas does not affect the interstate character of the transactions. The fact that Consolidated has not increased its deliveries to its Oklahoma customers, shows that by means of a contractual provision Consolidated is attempting to substitute Oklahoma Natural's gas for its interstate gas from Texas in making its Oklahoma deliveries. We do not think that the later contract can so effect the previous course of business." (23 F.P.C. 291, 293.)

Subsequently, in its Order Denying Rehearing, the Commission reaffirmed the previous decision, stating:

". . . By contract with Oklahoma Natural, it would at all times deliver more gas to these customers than it would receive from Oklahoma Natural, but . . . admittedly Oklahoma Natural's gas became commingled with interstate gas in Consolidated's pipeline and was thus undeniably transported, in part, out of Oklahoma.

"What we have here, is a sale of Oklahoma produced gas for resale to an interstate pipeline which would

then deliver this gas, commingled with gas from out-of-state sources, to customers in both Oklahoma and Kansas. Sales to such an interstate system would be, in our opinion, part of the interstate course of business and would be clearly in interstate commerce . . ." (23 F.P.C. 531, 532.)

Characterizing the contract's attempt to avoid jurisdiction as a device, the Commission's order stated:

"The contractual device of providing that Oklahoma Natural's gas shall be used in Oklahoma would not affect the interstate nature of the transaction that the parties proposed. It is a mere statement that does not alter the course of operations other than to require that Consolidated continue to make deliveries in Oklahoma. If the contract were able to have the effect claimed, every producer or other seller of gas within a given state which sells gas to an interstate pipeline could escape jurisdiction if the pipeline happened to sell an equal or greater quantity of gas within the same state, and the seller had the right kind of contract with the pipeline. A problem would then be posed as to which sellers of gas had the privilege of being considered non-jurisdictional and which ones must be considered to be making the interstate sales." (23 F.P.C. 531, 533.)

Both in its original *Oklahoma Natural* decision and in its Order Denying Rehearing, the Commission carefully distinguished the *North Dakota* case, saying in the former:[13]

[13] Chairman Kuykendall in his concurring opinion expressed the distinction thus: "In *State of North Dakota* v. *FPC*, 247 F. 2d 173, the gas over which we did not have jurisdiction was produced, transported, sold and consumed within the same state. *It was commingled and transported with gas which also had been produced within the state but eventually was transported out of the state and thus into interstate commerce. In other words the gas*

"In our opinion, *State of North Dakota* v. *F.P.C.* ... is distinguishable from the present case. In that case Montana-Dakota Utilities Company entered into contracts at approximately the same time for the purchase of 'dump' gas at the price of 9 cents per Mcf at a processing plant belonging to other parties at Tioga, North Dakota, and for the purchase of 'firm' gas at the same point for 16 cents per Mcf. All of the gas was to be produced in North Dakota . . . part of the 16 cent gas, . . . was to be transported by the Tioga-Williston line and was allegedly to be delivered by four proposed laterals to four towns in North Dakota where it would be consumed . . . We held with the examiner that the sale of the firm 16 cent gas to Montana-Dakota was entirely intrastate and were affirmed by the Court . . ." (23 F.P.C. 291, 294.)

In the original decision, the contrast was stated thus:

"In the present case the parties have attempted to keep Oklahoma Natural's gas separated from Consolidated's interstate stream, with which it is physically mixed, and to arrange by a contractual provision that all of Oklahoma Natural's gas be delivered in Oklahoma .... Consolidated had already been delivering its own gas received from Texas to its Oklahoma customers. Its sales to these customers were, of course, sales in interstate commerce within the meaning of the Gas Act. The later introduction of Oklahoma Natural's

---

transported intrastate was never transported or commingled with any gas which had entered and was in interstate commerce. Here the gas in question would enter, be commingled with, and transported with a stream of gas which already had been and still would be moving in interstate commerce. That is the *salient distinction* between the two situations." (Emphasis supplied.) (23 F.P.C. 291, 296.)

gas into Consolidated's pipeline does not even from a conceptual viewpoint cause Oklahoma Natural's gas to be delivered to these customers alone. The situation therefore is different from that in the Montana-Dakota case where separate contracts with separate prices and for separate kinds of service were executed at approximately the same time, so that it could be said that in spite of physical commingling the firm gas was identifiable and determinable and therefore intrastate . . . It would be a mere subterfuge to determine that the gas Oklahoma Natural would deliver to Consolidated in lieu of interstate gas, would be in intrastate commerce and nonjurisdictional.

"There is here more than a mere technical objection to the exemption requested . . . Because the amount of gas flowing in the interstate stream is altered by Oklahoma Natural's deliveries consumers beyond the state boundary are affected. This is the sort of thing that represents 'commerce which concerns more States than one.' It was intended by the Gas Act that we regulate such interstate commerce, and we have no choice but to deny the request for an exemption." (23 F.P.C. 291, 294-5.)

1015

And in the Order Denying Rehearing saying:[14]

"In *North Dakota* v. *F.P.C.*, . . . separation was achieved under different circumstances. Certain producers sold gas produced in North Dakota to Montana-Dakota Utilities at the tail-gate of a gasoline plant in North Dakota . . . all of the gas received at the gaso-

[14] The Commission also distinguishes on pages 533-34, *U.S.* v. *P.U.C.*, 345 U.S. 295; *Penna. Water & Power Co.* v. *F.P.C.*, 343 U.S. 414, 419; *Peoples Natural Gas Co.* v. *P.S.C.*, 270 U.S. 550; and *Hope Producing Co. et al.*, Docket No. G-15537, Feb. 3, 1959.

> line plant which is delivered in North Dakota, was purchased in North Dakota . . . in the present case . . . Consolidated's pipeline carries both Oklahoma and Texas produced gas and its deliveries to its customers in Oklahoma include gas produced in Texas. In the *North Dakota* case there was a direct association between the sale of the 16 cent gas to Montana-Dakota and its delivery in North Dakota. In the present case, Consolidated's sales had no prior association with Oklahoma Natural's gas, for there was an interstate system already operating and delivering gas in Oklahoma and Kansas. Injecting Oklahoma produced gas into that system even with a contract that an equal amount of gas would always be delivered in Oklahoma does not alter the interstate nature of Consolidated's operations and Oklahoma Natural's sale." (23 FPC 531, 533-34.)

In its Order Denying Rehearing, the Commission, therefore, concluded as follows:

> "In view of the above considerations and our previous order, Oklahoma Natural's sale to Consolidated is a sale for resale in interstate commerce. It appears Oklahoma Natural is a pipeline company as well as a producer, and there is no controversy on this point. Therefore Oklahoma Natural is a 'natural-gas' company as a pipeline company, and we have no option but to assert jurisdiction, but in any case, Oklahoma Natural is engaged in activities that are a part of an interstate business and alter the interstate flow of gas, so that it is in accord with the policy of the Natural Gas Act that such a company be subject to regulation as a pipeline company." (23 FPC 531, 535.)

Substituting Lo-Vaca and El Paso for Oklahoma Natural and Consolidated, the pertinent portions of the above-

quoted portions of that decision may be read to support similar conclusions as to the Lo-Vaca sale and El Paso's operations. As in *Oklahoma Natural,* the conclusion is clearly warranted that:

"Interstate commerce has taken place here because [Lo-Vaca] . . . has delivered gas which is transported outside the state and consumed outside it." (23 F.P.C. 291, 293.)

As in *Oklahoma Natural* also:

"This gas has entered the stream of interstate commerce, and has passed across the state border . . . [and] at least some portion of the gas . . . is resold to consumers outside the state of Texas . . . [where] by means of a contractual provision . . . [El Paso] is attempting to substitute . . . [Lo-Vaca's] gas for its interstate gas from Texas [and New Mexico] in making [a similar quantity available for increasing] its . . . [California] deliveries." (23 F.P.C. 291, 293.)

Likewise as in *Oklahoma Natural*:

"Injecting [Lo-Vaca's Texas] produced gas into . . . [El Paso's] system even with a contract that an equal amount of gas would always be . . . [used for compressor station fuel outside Texas] does not alter the interstate nature of . . . [El Paso's] operations and [Lo-Vaca's] . . . sale." (23 F.P.C. 531, 534.)

Thus, as in *Oklahoma Natural,* it is concluded that:

". . . our jurisdiction . . . [is based] on . . . [Lo-Vaca's transportation and sale] being in interstate commerce as a part of the transaction essentially interstate with interstate consequences." (23 F.P.C. 531, 534.)

(1016)

And, finally, as in *Oklahoma Natural*:

> ". . . [Lo-Vaca's] sale to . . . [El Paso] is a sale for resale in interstate commerce . . . [Lo-Vaca] is a pipeline company as well as a producer, . . . Therefore . . . [Lo-Vaca] is a 'natural-gas' company as a pipeline company, . . . but in any case . . . [Lo-Vaca] is engaged in activities that are a part of an interstate business and alter the flow of gas, so that it is in accord with the policy of the Natural Gas Act that such a company be subject to regulation as a pipeline company." (23 F.P.C. 531, 535.)

1017

As pointed out, *supra*, in footnote 14, the *Oklahoma Natural* decision distinguished a number of the other cases cited and relied upon by Lo-Vaca and El Paso, and it should be noted that the subsequent *Shell* case not only reaffirmed and to some extent expanded the separability doctrine of the *North Dakota* case, but also reaffirmed and distinguished the *Oklahoma Natural* case, as follows:

> "Nor are we able to find in any other facts concerning the Shell sale and the Columbian-El Paso exchange, or in the contractual provisions governing these transactions, any factors sufficient to convert what is nominally an intrastate sale of gas for the Seminole plant into an interstate sale . . . the sale of gas for the Seminole plant, although made under the May 20, 1948 contract governing the Shell sale, has no such immediate or substantial relationship to the Shell sale or to the Columbian-El Paso exchange as to justify finding it 'part of the interstate course of business,' in the language of the *Oklahoma Natural* case. Likewise, we are unable to determine that the interrelated transactions involved herein constitute a 'contractual de-

vice,' in the language of the *Oklahoma Natural* case, that might defeat Commission jurisdiction. Neither can we discern in the provisions of the contracts involved herein, or in the purpose or effect thereof, any justification for finding the sale of gas for the Seminole plant a sale in interstate commerce for resale subject to Commission jurisdiction."

Thus without undertaking to discuss herein the many cases pro and con cited and relied upon by the parties—all of which have been read and considered—it is concluded that the *North Dakota* case, as expanded by interpretation in the *Shell* case, is controlling as to the intrastate nature of Houston's contract, and Houston thereby is not subject to jurisdiction; and that the *Oklahoma Natural* case, as distinguished from the *North Dakota* case both therein and in the *Shell* case, is controlling as to Lo-Vaca's becoming a participant in an "interstate course of business," and, despite a "contractual device," thereby becoming subject to jurisdiction.

The instant situations are so parallel, both in their "crucial facts" and in their purposes and effects, to these controlling cases, respectively, that any separate discussion of other cases herein would constitute a work of supererogation.

G. Formal Findings and Conclusions

Upon consideration of the entire record in this proceeding, including the pleadings and briefs, and, in addition to the findings hereinbefore stated, it is further found and concluded that:

(1) El Paso Natural Gas Company is engaged in the transportation of natural gas in interstate commerce

and in the sale in interstate commerce of natural gas for resale for ultimate public consumption, and is a pipeline company and a "natural gas company" within the meaning of the Natural Gas Act, as heretofore found by the Commission.

(2) The sale and delivery of natural gas by Lo-Vaca Gathering Company to El Paso Natural Gas Company for fuel consumption outside of Texas, as hereinabove described, and as more fully described in the record and in the application, will result in Lo-Vaca being engaged in the transportation of natural gas in interstate commerce, and in the sale in interstate commerce of such gas for resale, and Lo-Vaca thereby will become a pipeline company and a natural gas company within the meaning of the Natural Gas Act.

(3) The natural gas facilities proposed to be constructed and operated by El Paso, Supply, and Lo-Vaca, as hereinbefore described, are to be used in the transportation and sale of natural gas in interstate commerce, and hence subject to the jurisdiction of the Commission, and to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

(4) The sale and delivery of natural gas by Houston Pipe Line Company, as hereinbefore described in the record and in Houston's Petition for Declaratory Order, will *not* result in Houston's being engaged in the transportation of natural gas in interstate commerce or in the sale in interstate commerce of such gas for resale, and Houston will *not* thereby become a natural gas company within the meaning of the Natural Gas Act.

(5) The natural gas facilities proposed to be constructed and operated by Houston, as hereinbefore described,

are to be used only in the transportation and sale of natural gas in *intrastate* commerce, and hence *not* subject to the jurisdiction of the Commission under the Natural Gas Act.

H. The Order

Wherefore, It Is Ordered, subject to review by the Commission pursuant to its Rules of Practice and Procedure, that:

(A) Lo-Vaca Gathering Company's application for authority to carry out, without obtaining an appropriate certificate of convenience and necessity therefor, its proposed restricted-use contract of March 15, 1960, for the sale and delivery of natural gas to El Paso Natural Gas Company, be and it hereby is denied.

(B) Houston Pipe Line Company's petition for a declaratory order be, and it hereby is, granted and it hereby is held, declared and ordered that Houston's proposed restricted-use contract for the sale and delivery of natural gas to El Paso Natural Gas Company, and its proposed construction and operation of natural gas facilities incidental to the said proposed sale and delivery, will not be subject to the Natural Gas Act.

Robert E. Freer
Robert E. Freer

Presiding Examiner

1052

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

In the Matters of

Docket No. CI60-693
LO-VACA GATHERING COMPANY

Docket No. CP61-177
HOUSTON PIPE LINE COMPANY

Exceptions of People of the State of California and Public Utilities Commission of the State of California to the Presiding Examiner's Decision

* * * * * * * * * *

Dated: August 29, 1961.

1053

TABLE OF AUTHORITIES

* * * * * * * * * *

1054

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

In the Matters of

Docket No. CI60-693
LO-VACA GATHERING COMPANY

Docket No. CP61-177
HOUSTON PIPE LINE COMPANY

Exceptions of the People of the State of California and the Public Utilities Commission of the State of California to the Presiding Examiner's Decision

The People of the State of California and the Public Utilities Commission of the State of California hereby

take the following exceptions to the Presiding Examiner's decision herein in accordance with Section 1.31 of the Rules of Practice and Procedure.

Exception No. I

California excepts to the decision for the reason that it does not contain a specific finding that some of the Houston gas purportedly sold for use in El Paso's compressor and fuel facilities located within the State of Texas will in fact be transported from points within Texas to points outside Texas and sold for ultimate public consumption. California proposes that the following finding be numbered (4) and inserted in that position on page 25 of the Examiner's decision:

> "We find that a portion of the natural gas to be sold and delivered by Houston Pipe Line Company will be transported from points in the State of Texas to points outside said State and resold for ultimate public consumption."

California submits that the following reasons support its proposed finding:

1. The parties agree to the finding here proposed.

At pages 6 and 7 of his decision the Examiner observes that:

> ". . . there is general agreement among the parties and the witnesses that some part of the gas proposed to be sold and delivered for fuel consumption in Texas[5] as well as a part of that proposed to be sold and delivered by Lo-Vaca for fuel consumption outside of

[5] El Paso's Reply Brief, p. 2, for example, states: 'El Paso's argument . . . assumes that some of the molecules of the Houston gas will pass outside of Texas.' (Cf. Tr. pp. 332, 343-44.)"

> Texas, inevitably would be *physically* transported in interstate commerce for resale in interstate commerce by El Paso for ultimate consumption in California, . . .

In view of this specific finding that the parties agree that some of the Houston gas will be transported out of Texas and resold, it was error for the Examiner not to make the finding here requested. Certainly if the parties are in agreement on an issue, there is no cause for failure to find in accordance with this agreement.

2. The finding is well supported by the record, and is indeed the only finding on the issue which can permissibly be drawn from the evidence.

In this regard we respectfully request the Commission to review the portions of California's brief under the heading "STATEMENT OF THE CASE" entitled "Physical Arrangements", "Integration of Facilities", and "Conclusions" for a full discussion of this issue. California desires to point out that this is the issue as to which its contention, deemed irrelevant by the Examiner in footnote 10, page 16 of his decision, is material.

Exception No. II

California excepts to the decision for the reason that it does not contain a specific finding that the portion of Houston gas which will actually be used by El Paso within the State of Texas cannot be determined. California proposes that the following finding be numbered (5) and inserted in that position on page 25 of the Examiner's decision:

> "We find that the portion of the natural gas to be delivered and sold by Houston Pipe Line Company

which will be used by El Paso wholly within the State of Texas cannot be determined."

The record is devoid of even the slightest evidence by which such portion can be determined. Indeed, because of commingling with other supplies and the practicalities of pipeline operation, all as more fully discussed at pages 6-11

of California's brief, it appears unlikely that a meaningful and useful determination can ever be reached. It goes without saying that mere assertion, as by contract, that a certain portion will be so used is irrelevant to a determination of the portion actually to be so used, absent the necessary physical arrangements for effectuation. Accordingly, the Examiner erred insofar as he failed to make this finding.

Exception No. III

California excepts to the decision for the reason that it does not contain a conclusion that the fact that the portion of Houston gas to be used by El Paso within the State of Texas is indeterminable requires that such portion be treated the same as the portion which will be transported and resold outside Texas for ultimate public consumption. California proposes that the following conclusion be numbered (6) and inserted in that position on page 25 of the Examiner's decision:

"We conclude that, the portion of the natural gas to be sold and delivered by Houston Pipe Line Company for use by El Paso wholly within the State of Texas being indeterminable, the Natural Gas Act requires that said portion be considered as being transported from points in the State of Texas to points outside said State and resold for ultimate public consumption."

In this connection, the Commission's attention is invited to the discussion at pages 18-20 and 23-31 of California's brief, where the issue is thoroughly considered.

1058

Exception No. IV

California excepts to the decision for the reason that it does not contain a conclusion that the whole of the Houston gas will be transported and sold for resale in interstate commerce and that Houston will become a natural gas company within the meaning of the Natural Gas Act. California proposes that the following conclusion be numbered (7) and inserted in that position on page 25 of the Examiner's decision:

> "We conclude that the natural gas to be sold and delivered by Houston Pipe Line Company will be transported and sold in interstate commerce for resale for ultimate public consumption, that the provisions of the Natural Gas Act will apply to the transportation and sale, and that Houston will become a natural gas company within the meaning of said Act."

These conclusions follow directly from Sections 1(b), 2(6) and (7) of the Act and the findings and conclusions proposed by California herein. California's brief, pages 18-20 and 24-29, analyzes the relevant cases.

Exception No. V

California excepts to the following findings and conclusions and takes the position that the same must be deleted:

> "(4) The . . . delivery of natural gas by Houston Pipe Line Company, as hereinbefore described in the record and in Houston's Petition for Declaratory Order, will *not* result in Houston's being engaged

in the transportation of natural gas in interstate commerce . . . and Houston will *not* thereby become a natural gas company within the meaning of the Natural Gas Act.

1059

"(5) The natural gas facilities proposed to be constructed and operated by Houston, as hereinbefore described, are to be used only in the transportation and sale of natural gas in *intrastate* commerce, and hence *not* subject to the jurisdiction of the Commission under the Natural Gas Act."

California submits that the following reasons support its position:

1. The contractual restriction of Houston gas to use wholly in intrastate commerce is inoperative to defeat the Commission's jurisdiction.

a. Insofar as contracts are expressions of *intention*, such intention cannot override the physical fact of interstate transportation and sale.

The issue was raised in the *Deep South* case (*Deep South Oil Co.*, 14 FPC 83 [1955]), one of the first important producer-jurisdiction cases to arise after the *Phillips* decision (*Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 [1954]). In disposing of the producers' contention that they did not intend to sell in interstate commerce, the Commission said:

". . . where upon investigation it is found that the sales and movement in question are generally in interstate commerce . . . *the facts and not intent are conclusive.*" (at 87)

The Commission concluded it had jurisdiction, and such was affirmed on appeal on the basis of the physical

movement of the gas, regardless of intent. *Deep South Oil Company* v. *F.P.C.*, 247 F. 2d 882, 887-8 (5th Cir. 1957).

California discusses this issue in its brief at pages 24 and 25, and that exposition shows that a contractual intention to restrict the gas against interstate commerce is ineffective in the face of the physical facts. This was also the holding of *J. M. Huber Corp.* v. *F.P.C.*, 236 F. 2d 550 (3d Cir., 1956), to which the Commission's attention is invited.

b. Insofar as contracts are expressions of *agreement*, such agreement cannot override the physical fact of interstate transportation and sale.

California's brief, pages 29 and 30, discusses the latest Supreme Court decision dealing with the problem, *United States* v. *Public Utilities Commission*, 345 U.S. 295 (1953). In suggesting the criteria by which a contractual restriction forbidding resale might be given effect and the sale determined not to be a "sale . . . for resale" within the meaning of the Federal Power Act, the Court was careful to distinguish between the "sale . . . for resale" concept and the "interstate commerce" concept (at 317).

The distinction is important. The term "sale" is one of ordinary commercial usage. It implies *an agreement* between a buyer and a seller.

The term "interstate commerce", on the other hand, carries *no* connotation of agreement or contract. There may be interstate commerce *regardless* of contract. Contracts or agreements are completely irrelevant to

the question of whether or not there is interstate commerce. The issue is solely one of physical fact. As the Supreme Court in the *Connecticut Light & Power* case said, speaking of the corresponding Federal Power Act:

> "This bill came before Congress . . . couched in . . . technical language . . . Federal jurisdiction was to follow the flow . . ." (*Connecticut Light & Power Co.* v. *F.P.C.*, 324 U.S. 515, 529 [1945]).

Contracts or agreements obviously cannot change that flow, nor subtract one whit from the resulting federal jurisdiction.

c. Later court and Commission decisions have not eroded the distinction between the effect of contractual restrictions on "sales . . . for resale" and on "interstate commerce" enunciated by *United States* v. *Public Utilities Commission*, but, on the contrary, support that distinction.

The latest Supreme Court decision concerning the Commission's jurisdiction, the *Transco* decision

(*F.P.C.* v. *Transcontinental Gas P. L. Corp.*, 365 U.S. 1 [1961]), sets forth the guiding principles. Those principles are carefully analyzed at pages 14 and 15 of California's brief, and three considerations or criteria are developed for the allocation of power between nation and state. California suggests in the brief that application of these criteria determines jurisdiction; that thereafter, it is merely a matter of semantics as to which statutory label to apply to the conclusion (at 22).

California's brief, at pages 20-22 and 30, thoroughly considers the case principally relied upon by Houston,

North Dakota v. *F.P.C.*, 247 F. 2d 173 (8th Cir. 1957). California concludes in the brief that the Court in the *North Dakota* case properly determined jurisdiction under the *Transco* criteria. Only the Court's semantics were faulty. Had the Court applied the label "local distribution" to that transaction, its decision would be prefectly in accord with *United States* v. *Public Utilities Commission* and the proposition that contractual restrictions against interstate commerce are ineffective to allay federal jurisdiction.

This analysis of the *North Dakota* case indicates that the only relevant statutory limitation on the "interstate commerce" basis for Commission jurisdiction

is that of "local distribution". When the policies behind that limitation are not present, the transaction is jurisdictional.

California carefully reviews at pages 15-17 of its brief the effect of allowing the contractual restriction of Houston gas to defeat the Commission's jurisdiction, and there demonstrates that the policies behind the "local distribution" exemption are inapplicable to the present facts. A review of that discussion reveals the great contrast between the appropriateness of local regulation in the *North Dakota* case and the inappropriateness of local regulation in the present case. In this respect, the facts of the Commission's recent decision, *Shell Oil Co.*, Dkt. No. G-5029 (June 30, 1961), upon which the Examiner relied, much more resemble the *North Dakota* facts than those of the present case. California invites the Commission's attention to pages 15-18 of its brief, wherein these matters are more thoroughly considered and applied to the facts of the Houston sale.

2. The contractual restriction of Houston gas to use wholly in intrastate commerce is invalid as contrary to the public interest in view of the substantial adverse effects should the restriction be recognized.

1064

a. The Commission would lose control over a substantial segment of field prices and contract terms which it presently regulates.

Under the *Transco* decision, the Commission was affirmed, in the exercise of its certificating power over pipeline facilities, with respect to its attempt to control area prices and price increases adversely affecting the public convenience and necessity. Establishment of a policy of recognition of such a restriction as Houston proposes here will remove the basis for Commission jurisdiction in *Transco*—the transportation in interstate commerce basis. This will substantially dilute the power the Commission presently exercises over field prices and contract terms.

This is a serious matter. Some indication of its adverse impact can be gleened from the present record. California's brief, page 5, mentions two of the unsatisfactory terms of the Houston transaction; a study of the Houston contract reveals many others. The existence of such terms should not be surprising in view of Houston's stated purpose of avoiding FPC jurisdiction.

b. Needless duplications, rejugglings and other uneconomical expenditures on the part of the interstate

1065

pipelines would be encouraged.

New constructions would be directed with an eye to restriction as an inducement to attachment of large

reserves, rather than with an eye to most economical location and efficient operation. Indeed, it is not inconceivable that the primary motivation behind many new construction projects would become the provision of intrastate uses for "restricted" gas, rather than the provision of new facilities in order to supply the market. Other diseconomies would result from the needless changeover of old facilities to utilization of "restricted" gas, regardless of the expense and operating cost increases thereby resulting.

This is not mere idle spectulation. The record shows that many of these diseconomies may be present in this very case. Calinfornia's brief, page 11, explores some of the possibilities in this regard. Clearly it was error for the Examiner to fail to regard the interstate commerce restriction as contrary to the public convenience and necessity and as a matter of law invalid and not entitled to recognition in the determination of jurisdiction.

1066

Exception No. VI

California excepts to the following findings and conclusions and takes the position that same must be deleted:

"(4) The sale . . . of natural gas by Houston Pipe Line Company, as hereinbefore described in the record and in Houston's Petition for Declaratory Order, will *not* result in Houston's being engaged . . . in the sale in interstate commerce of such gas for resale, and Houston will *not* thereby become a natural gas company within the meaning of the Natural Gas Act."

California submits that the following reasons support its position:

1. The contractual restriction of Houston gas to use wholly by El Paso is inoperative to defeat the Commission's jurisdiction:

a. The Examiner so held with respect to Lo-Vaca gas, also contractually restricted against resale.

The Examiner's finding and conclusion number (2) deals with the corresponding "sale-not-for-resale" restriction contained in the Lo-Vaca contract. In the face of this restriction, the Examiner nevertheless held that the Lo-Vaca sale was jurisdictional. His findings and conclusions number (4), quoted above, by giving effect to the analogous restriction in the Houston contract, are clearly inconsistent with his Lo-Vaca holding.

b. The law requires that such restrictions be ignored on the facts of the instant case.

Application of the *Transco* principles discussed under Exception V and in California's brief, pages 15-17, to the instant facts results in denial of any jurisdictional effect to the "sale-not-for-resale" restriction. After all from a practical standpoint, the *Transco* considerations being nothing more than this, the price of gas sold to an interstate pipeline for compressor use is ultimately borne by the consumers of transported gas, just as those consumers bear the purchase price of the gas they use themselves. The only difference, as California points out in its brief, page 16, is that one expense shows up in Account 854 and the other in Account 803. The principle of the noted *Phillips* decision will not permit any jurisdictional significance to attach to this mere accounting distinction.

For it is basic lore that a regulated company's expenses can always be attacked in a rate proceeding as unreasonable. Prior to the *Phillips* decision, this principle dictated that unreasonable pipeline expenditures for compressor fuel gas and for resale gas be disallowed. The *Phillips* decision held that, even so, the difficulties consequent upon application of this

principle to natural gas pipelines require that the price of gas sold to the pipeline itself be regulated. Neither the decision of the Presiding Examiner nor the briefs of Houston, Lo-Vaca and El Paso cite any reason why the Commission should exempt what would otherwise be a jurisdictional transaction under the *Phillips* decision from the protection that decision afforded consumers. We know of none, either.

On the contrary, we, as representatives of the consumers of the state most needing protection in this case, vigorously oppose any weakening of *Phillips* and any subversion of that Supreme Court's mandate. We have quoted in our brief, page 16, an excerpt from the case upon which *Phillips* mainly relied, and believing it so *apropos*, wish to submit it for the Commission's special consideration:

> "Unreasonable charges exacted at this stage of the interstate movement become perpetuated in large part in fixed items of costs which must be covered by rates charged subsequent purchasers of the gas, including the ultimate consumer. It was to avoid such situations that the Natural Gas Act was passed." (*Interstate Natural Gas Co. v. F.P.C.*, 331 U.S. 682, 693 [1947]).

It supports no distinction in gas purchase accounts such as the parties here contend is of jurisdictional significance.

1069

c. The cases cited by the parties as being opposed to this principle are, on the contrary, perfectly in accord.

The case of *United States* v. *Public Utilities Commission* was considered in Exception V, with the conclusion that while the case does recognize the possibility of contractually restricted direct sales, the *Transco* considerations limit such recognition to only those situations in which it is possible for a state to be uniquely effective in securing against exploitation.

The *City of Hastings* case relied upon so heavily by Houston and Lo-Vaca, and discussed at page 30 of California's brief, is just such a situation. In that case, the direct sale from an interstate pipeline to a local distribution system for boiler fuel purposes could be uniquely regulated by the state in which the gas was consumed. Consequently, there was no need for federal jurisdiction.

Other cases which have recognized this principle are the *Pennsylvania Gas* case, California brief, page 29, interpreting the Constitution, and *Panhandle Eastern Pipeline Co.* v. *Public Service Commission*, 332 U.S. 507 (1947), based on the Natural Gas Act. The principle would seem applicable to the direct sale to Consolidated

1070

Edison in the *Transco* case, as well. No case opposing this principle is known; none are cited by Houston, Lo-Vaca or El Paso.

2. The contractual restriction of Houston gas to use wholly by El Paso is invalid as contrary to the public

interest in view of the substantial adverse effects should the restriction be recognized.

We have already adverted to the fact that absence of federal regulation of the sales price in this case means no regulation, because there is no state which is *unique* in the sense of being able to protect its own consumers while not affecting consumers in other states. Yet, of course, the sales price will ultimately be borne by these consumers, who are largely an interstate market. Thus, recognition by the Commission of direct sale restrictions when consumers in more than one state are involved will open up a very large market to unregulated sales. The jurisdiction the Commission has exercised in the past will be substantially diluted because, to California's knowledge, direct sale restrictions in pipeline supply contracts have not been used until now.

It need not be gainsaid that it is unlikely that such contractually restricted sales will be made at prices as low as the Commission is currently certificating as meeting the public convenience and necessity. Both the Houston and Lo-Vaca prices involved here bear this out (California brief, p. 5). The

Commission's attention is invited to California's previous discussion (Exception V, 2 and brief, pp. 3-5 and 9-14) of the further evils recognition of direct sale restrictions entails.

Conclusion

California requests, for the reasons set forth above and as further explained in its brief, that the foregoing proposed findings and conclusions be made a part of this Commission's decision, and the proposed deletions be made.

It further requests that the order as proposed by the Examiner be revised in accordance with the findings and conclusions proposed here, and in particular that Part (B) of that order be deleted and the following substituted therefor:

> "Houston Pipe Line Company's petition for a declaratory order be, and it hereby is, granted and it hereby is held, declared and ordered that Houston's proposed restricted-use contract for the sale and delivery of natural gas to El Paso Natural Gas Company, and its proposed construction and operation of natural gas facilities incidental to the said proposed sale and delivery, will be subject to the Natural Gas Act."

Respectfully submitted,

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

By /s/ WILLIAM M. BENNETT

William M. Bennett
Chief Counsel

/s/ J. CALVIN SIMPSON
J. Calvin Simpson
Senior Counsel

/s/ GERALD A. LASTER
Gerald A. Laster
Counsel

Dated: August 29, 1961.

1100

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Opinion No. 348

Docket No. CI60-693
LO-VACA GATHERING COMPANY

Docket No. CP61-177
HOUSTON PIPE LINE COMPANY

Opinion and Order Determining Jurisdiction

1101

APPEARANCES

For Lo-Vaca Gathering Company

Jack Ware, Esquire, Corpus Christi, Texas
Bradford Ross, Esquire, Washington, D. C.
David I. Granger, Esquire, Washington, D. C.

For Houston Pipe Line Company

Hugh Q. Buck, Esquire, Houston, Texas
Richard L. McGraw, Esquire, Houston, Texas
Jefferson D. Giller, Esquire, Houston. Texas

For Southern California Gas Company

Harry P. Letton, Jr., Esquire, Los Angeles, California
L. T. Rice, Esquire, Los Angeles, California
Henry F. Lippitt, Esquire, Los Angeles, California
John Ormasa, Esquire, Los Angeles, California

For Southern Counties Gas Company of California

Milford Springer, Esquire, Los Angeles, California
Robert M. Olson, Jr., Esquire, Los Angeles California

For Pacific Gas and Electric Company

F. T. Searls, Esquire, San Francisco, California
Malcolm H. Furbush, Esquire, San Francisco, California

1102

For the People of the State of California and Public Utilities Commission of the State of California

William M. Bennett, Esquire, San Francisco, California
William L. Cole, Esquire, San Francisco, California
Gerald A. Laster, Esquire, San Francisco, California
J. Calvin Simpson, Esquire, San Francisco, California
Walter G. Linstedt, Esquire, San Francisco, California

For Transwestern Pipeline Company

Raybourne Thompson, Esquire, Houston, Texas
J. Evans Attwell, Esquire, Houston, Texas

For El Paso Natural Gas Company and El Paso Gas Supply Company

Allen R. Grambling, Esquire, El Paso, Texas
George D. Horning, Jr., Esquire, Washington, D. C.

For Texaco, Inc.

Frank H. Strickler, Esquire, Washington, D. C.
Alfred C. DeCrane, Jr., Esquire, Houston, Texas
Paul F. Schlicher, Esquire, New York, New York

For the Staff of the Federal Power Commission

C. Louis Knight, Esquire, Washington, D. C.

1103

(Issued October 23, 1961)

SWIDLER, Chairman:

As set forth by the presiding examiner in his decision issued August 11, 1961, these proceedings concern the question whether we would have jurisdiction under the Natural Gas Act over proposed sales of natural gas by Lo-Vaca Gathering Company and by Houston Pipe Line Company to El Paso Natural Gas Company. The proceedings arose by Lo-Vaca's filing on June 1, 1960, CI60-693, of an application for a certificate of public convenience and necessity and the filing by Houston on December 27, 1960, CP61-177, of a petition for a declaratory order under Section 16 of the Natural Gas Act to remove uncertainty as to our jurisdiction over Houston's proposed sale.

The sales in issue here are purportedly designed to provide additional gas supply to be used by El Paso for the operation of its compressors and the gasoline plant of Phillips Petroleum Company in Ector County, Texas. El Paso comprises a large pipeline system which extends from the Permian Basin in New Mexico and Texas by means of two large pipelines through New Mexico and Arizona to the border of California. Recently it acquired an additional pipeline extending from New Mexico to the Pacific Northwest. The greater part of its gas supplies is sold to its California customers at the border of that State.

In another proceeding, Docket No. CP60-101, El Paso Gas Supply Company, a wholly owned subsidiary of El Paso, filed with the Commission an application for a certificate authorizing it to construct a compressor station to be known as the Coquat Station located near the community of Three Rivers in Live Oak County, Texas, and a

30-inch pipeline approximately 227.6 miles in length, extending from the Coquat Station to a point of connection with El Paso's system at its Sonora Plant in Sutton County, Texas. At Coquat, the Supply Company would receive for the account of El Paso the gas proposed to be sold by Lo-Vaca and Houston, all of which, it is stated, would be produced in Texas.

1104

Lo-Vaca is a Texas corporation of Corpus Christi, Texas, and a wholly owned subsidiary of Coastal States Gas Producing Company, but at present owns no facilities and engages in no operations. By a contract dated May 16, 1960, Lo-Vaca agreed to sell and deliver an average of 50,000 Mcf of natural gas per day at 14.65 psia to El Paso at Coquat. Later this amount was increased to 80,000 Mcf per day. The contract which is free of restrictions upon the resale of gas by El Paso, is for 20 years at an initial price of 22¢ per Mcf.[1] There is no dispute that this sale would be subject to our jurisdiction. The issue of jurisdiction arises over a proposed sale of another 50,000 Mcf per day at 14.65 psia under contract of March 15, 1960, between Lo-Vaca and El Paso, which is substantially the same as the May 16, 1960 contract, but provides that it is the intention and understanding of the parties that the sale would not be subject to our jurisdiction. In Article XVI of the contract, it is further provided

> "All of the gas to be purchased by El Paso from Gatherer under this agreement shall be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps, and other facilities located outside of the State of Texas. It is understood, however, that said gas will be commingled with other gas being transported in El Paso's pipe line system."

[1] The level of the rate is not in issue at this stage in the proceedings.

Lo-Vaca has stated that it intends to sell the gas under both contracts whether or not we have jurisdiction, that it has entered into contracts with a number of producers, and that it plans to construct facilities to gather the gas purchased in Live Oak, Goliad, Lavaca, and adjacent counties in Texas, and transport such gas to Coquat for delivery and sale to El Paso.

Houston is a Texas corporation of Houston, Texas, and a wholly-owned subsidiary of the Houston Natural Gas Corporation. Since 1925, it has engaged in the purchase, transportation and sale of natural gas within Texas, and at present makes no sales to El Paso. By contract of July 19, 1960, Houston proposed to sell an average of 70,000 Mcf per day to El Paso for a 20-year term. As in the case of the Lo-Vaca contract, Houston's gas would be transported and delivered at Coquat, but would be metered separately from Lo-Vaca's gas. The price is to be determined according to a formula which, if applied to the billing month of November, 1959, would have produced 19.5¢[1] plus certain taxes for each unit of one million btu. The contract contains rather elaborate provisions purportedly restricting the use to be made of the gas by El Paso. It recognizes that any gas purchased from Houston must necessarily be commingled with other gas being transported by El Paso in its pipeline system, but in Section 2. 1, "El Paso represents and covenants that gas to be purchased by El Paso from Houston hereunder shall be used and consumed by El Paso solely as fuel in the operation of El Paso's plant and in the gasoline plant of Phillips Petroleum Company in Ector County, all

1105

located wholly within the State of Texas." El Paso further covenants that it would not take from Houston a

[1] The level of the rate is not in issue at this stage in the proceedings.

quantity of gas in excess of the quantity required for fuel in Texas.

The record shows that gas received by El Paso at Coquat from Lo-Vaca and Houston would move physically in a commingled stream, through the proposed supply company's pipeline to Sonora where it would enter El Paso's facilities. Some would be used as fuel in El Paso's Sonora plant and the rest would move, with further commingling of gas from the Sonora plant and other sources, to Benedum Junction in Upton County, Texas. One portion of this commingled stream would flow from Benedum Junction toward El Paso's Goldsmith Plant in Ector County, Texas and northward to Plains, Texas, from whence the gas stream would be transported westward through El Paso's northern pipeline which extends to the border of California. Between Benedum and Plains the stream would be further commingled with gas from numerous sources. The other portion of the gas from the Benedum Junction point would flow through Crane County to El Paso's Keystone Compressor Station in Winkler County, Texas. From there the main line of El Paso's southern pipeline extends into New Mexico, then back into Texas and then into New Mexico again near the City of El Paso and on to the border of California. There would be further commingling in New Mexico with gas from other Texas and New Mexico sources.

El Paso proposed in Docket No. G-18616, now pending before the Commission, to supply its mainline compressor stations in West Texas with a new 16-inch line extending from the Keystone Compressor Station to West Texas and running entirely in Texas, rather than across the corner of New Mexico. The fuel supply to these West Texas compressor stations would thus be produced and transported entirely in Texas, but physically the gas in this new line would be composed of gas from the com-

mingled stream in El Paso's line at the Keystone Compressor Station.

Evidence in the record shows the facilities located in Texas which would allegedly use Houston's gas. These facilities are composed of 23 compressor stations, including Coquat, owned by El Paso and Phillips' Goldsmith Plant. On an average day their requirements would exceed the average day volume to be purchased from Houston by 6.091 M²cf per day and on a maximum day would exceed the supply by 31.879 M²cf per day. To give some semblance of physical delivery of Houston's gas to the existing stations, El Paso proposes to rearrange its station fuel piping at certain stations. This station fuel supply would connect to the main line by means of new supply laterals. An estimated expenditure of approximately $253,000 is propoesd for this purpose. Since the plants are already supplied with fuel, these new facilities are obviously unnecessary.

The record also shows the compressor stations, 22 in number, located in New Mexico and Arizona, which could allegedly use Lo-Vaca's gas. Their requirements under the March 15, 1960 contract would exceed the gas purchased from Lo-Vaca by 21.373 M²cf per day on an average day and

by 36.549 M²cf per day on a maximum day. However, the record makes it clear that because of commingling, the gas from Houston and Lo-Vaca would in part be consumed by El Paso either within or outside of Texas and would in part be carried on to El Paso's customers in New Mexico, Arizona and California.

After the filing of briefs, the examiner issued his decision on August 11, 1961. He found that Lo-Vaca's sale

would be subject to the Commission's jurisdiction but that Houston's sale would not be. With respect to Lo-Vaca, he concluded that the Commission's decision in *Oklahoma Natural Gas Co.*, 23 FPC 291, and order denying rehearing, 23 FPC 531, were controlling. On the other hand he felt that the sale by Houston was controlled by the Commission's recent decision in *Shell Oil Company, et al.*, Docket Nos. G-5029, *et al.*, issued June 30, 1961.

Lo-Vaca, the Public Utilities Commission of California, Southern California Gas Company and Southern Counties Gas Company of California, and our staff filed exceptions to the examiner's decision. Lo-Vaca's citing authorities, argues that its sale to El Paso of gas contractually restricted for consumption in its facilities in New Mexico and Arizona would be a direct sale not subject to this Commission's jurisdiction. It emphasizes that this gas was the subject of a separate contract, that purchases from Lo-Vaca and deliveries to El Paso's facilities were separately metered, and that El Paso would consume as fuel volumes of gas in excess of the volumes received from Lo-Vaca. It contends that the commingling of the restricted use gas with gas intended for resale would not prevent the sale from being nonjurisdictional as a direct sale, although of course, it admits the gas would be transported in interstate commerce. The California Commission and our staff objected to the examiner's failure to find jurisdiction over Houston's sale to El Paso. The California Commission argues that the contractual expressions of intention cannot override the physical fact of interstate transportation and sale. It expresses the fear that if some of the gas purchased by a pipeline could be restricted in the manner herein contemplated, the Commission would lose control over a substantial portion of field prices, and there would result uneconomical expenditures on the part of the pipelines in order to attach reserves

for the intrastate market. It contends further that consumers of the interstate gas would ultimately have to bear any higher price for compressor fuel gas not subject to our regulation.

The staff's position is that Houston's sales and Lo-Vaca's sales would be subject to our jurisdiction and that this cannot be avoided by contractual restrictions on the gas sold. The staff argues that the Houston and Lo-Vaca gas would flow in continuous movement from Texas to markets in other states where it would be resold and the fact that Houston's and Lo-Vaca's gas would be mixed in El Paso's facilities with gas from other sources would have no effect on the jurisdictional status of Houston's and Lo-Vaca's sales. The staff argues further that it is not logical to treat Houston's sales as non-jurisdictional and Lo-Vaca's sales

1107

as jurisdictional and that we are not authorized to put into the hands of buyers and sellers of gas the power to determine by contract the jurisdictional status of their sales. To do so the staff contends would create a serious regulatory gap. Likewise, among other points the two southern California companies contend that Houston's gas would be mixed with other gas and would flow outside of Texas to California and the sale of this gas would not be removed from our jurisdiction because of a contractual device.

On this record, the briefs, the examiner's decision and the exceptions, the question before us is whether contractual arrangements and the intentions of the parties can segregate Lo-Vaca's and Houston's gas sold to El Pase from other gas received by El Paso regardless of physical commingling, the actual destination of the gas, and the operations of El Paso's system. In our opinion, as dis-

cussed below, such a segregation would not be achieved here and both sales would be subject to our jurisdiction.

The Natural Gas Act as shown in Section 1 (b) applies "to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use * * * but shall not apply to any other transportation or sale of natural gas * * *." It is clear enough that physically the specific gas sold by Lo-Vaca and Houston would actually in part be resold to customers outside of Texas and it would be physically impossible to restrict the consumption of this gas to El Paso's facilities either inside or outside the state. It would be contrary to the facts to assume that the restricted gas would go only to the compressor stations, while other gas purchased by El Paso would be sold for resale. Thus, literally, the gas sold by Houston and Lo-Vaca would come within the wording of the statute as sold in interstate commerce for resale.

In reaching this conclusion, we are cognizant of the fact that there exist in the natural gas industry arrangements whereby companies transport natural gas for other companies, commingling it with gas from various sources. Although under some of the transportation arrangements, gas is purchased by the ultimate recipient directly from producers, generally there is no earmarking of specific gas to the ultimate destination. The delivering company is simply obligated to deliver a specified volume. In such a case, the volume of gas purchased may be compared to a "contract demand volume" since there is no earmarking of any volume as delivered from a particular source. It is not our intention by this opinion to disturb such transporation arrangements. What we say in this opinion relates only to what constitutes interstate commerce and our jurisdiction under the Natural Gas Act.

(1107)

It is well settled that the business of selling and transporting gas, electric energy and other goods from one state to another constitutes interstate commerce. This is true of a sale of grain in one state which is to be transported by the buyer to another state, *Lemke* v. *Farmers Grain Co.*, 258 U.S. 50, 55; *Dahnke-Walker Co.* v. *Bondurant* 257 U.S. 282, 290, as well as the auction of tobacco to be transported by the buyers to points outside the state, *Currin* v. *Wallace*, 306 U.S. 1, 10, and the purchase of cattle transported from

1108

another state, *Swift and Co.* v. *United States*, 196 U.S. 375, 398-399, where Justice Holmes said, "Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business." Sales of gas by interstate pipeline systems are sales in interstate commerce where the gas sold has been produced in another state even when mixed with gas produced in the same state. *Missouri* v. *Kansas Gas Co.*, 265 U.S. 298, 306; *P.U.C. of Kansas* v. *Landon*, 249 U.S. 236, 245. When such sales are for resale, they are subject to our jurisdiction. *Panhandle Eastern Pipe Line Co.* v. *Comm'n.*, 332 U.S. 507, 516-517; *F.P.C.* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 582. In the latter case, the Court said:

> The sale of gas originating in one State and its transportation and delivery to distributors in any other State constitutes interstate commerce, which is subject to regulation by Congress.

The same conclusion applies to sales of electric energy generated in another state although mixed with energy generated in the state of sale. *Pennsylvania Water and Power. Co.* v. *F.P.C.*, 343 U.S. 414; *Wisconsin-Michigan Power Co.* v. *F.P.C.*, 197 F. 2d 472 (CA 7), certiorari

denied 345 U.S. 934. Sales of electric energy in the state of generation where the energy is to be transmitted out of the state and consumed in another state are also in interstate commerce. *Public Utilities Comm.* v. *Attleboro Steam & Elec. Co.*, 273 U.S. 83; *Hartford Electric Light Co.* v. *F.P.C.* 131 F. 2d 953 (CA 2), certiorari denied 319 U.S. 741. In *Jersey Central Co.* v. *F.P.C.*, 319 U.S. 61, 71-72, it was said:

> "If intervening companies might purchase from producers in the state of production, free of federal control, cost would be fixed prior to the incidence of federal regulation and federal rate control would be substantially impaired, if not rendered futile."

Of particular relevance to this proceeding, it has been held in many cases that a sale of gas in the producing state where the gas is to be transported and sold for resale in another state is a sale in interstate commerce and subject to our jurisdiction. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 682-684; *Interstate Natural Gas Co.* v. *F.P.C.*, 331 U.S. 682, 687-688; *Saturn Oil & Gas Co.* v. *F.P.C.*, 250 F. 2d 61 (CA 10) certiorari denied 355 U.S. 956; *Continental Oil Co.* v. *F.P.C.*, 247 F. 2d 904 (CA 5); *Deep South Oil Co.* v. *F.P.C.*, 247 F. 2d 882 (CA 5),[2] *Shell Oil Co.* v. *F.P.C.*, 247 F. 2d 900, 903 (CA 5), certiorari denied 355 U.S. 930. In the *Phillips* case the Court said (347 U.S. at p. 682):

> • • • we believe that the legislative history indicates a congressional intent to give the Commission jurisdiction over the rates of all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during or after transmission by an interstate pipeline company.

[2] Certiorari was in effect denied in companion *Shell* case next cited.

In the *Saturn* case, which involved wellhead sales of natural gas to two interstate pipelines by a small unintegrated oil company, the court said:

> "The Phillips decision holds that the Act applies to all wholesale by producers. Saturn may not escape regulation because of its size or because of the restricted nature of its operations."

Deep South is also a small unintegrated producer of oil and gas selling gas to a gatherer and processer which, in turn, sells Deep South's gas, mixed with other gas, to an interstate pipeline. The court said in reply to a contention that the Deep South's sales were made for manufacture not resale (247 F. 2d at p. 888):

> The inescapable fact here then is that at least some portion of the gas sold by petitioner is resold to consumers outside the State of Texas. Consequently, there can be no question that petitioner is making sales for resale within the meaning of the Act.

We are of the opinion that the principles expressed in these cases are not changed by the contractual provisions with respect to the disposition of the gas here involved. It is the "nature of the beast" not the label that is controlling. It has been held that whether a transaction is in interstate commerce is determined by the essential character of the commerce, not necessarily by the contract. *Atl.C.L.R.R.* v. *Standard Oil Co.*, 275 U.S. U.S. 257, 268; *B.&O.S.W.R.R.Co.* v. *Settle*, 260 U.S. 166, 170. With respect to the Federal Power Act which is similar to the Natural Gas Act, the Supreme Court has said, "Federal jurisdiction was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or

governmental test." *Connecticut Light & Power Co.* v. *F.P.C.*, 324 U.S. 515, 529.

In *Shell Oil Co.* v. *F.P.C. supra,* gas was sold to Phillips which processed it, removed liquefiable hydrocarbons and resold the residue gas to El Paso. In attempting to refute our jurisdiction Shell relied on its contract with Phillips providing that the gas was conveyed to Phillips for the purpose of manufacturing gasoline. The court pointed out that there was actually no restriction on the disposition of the residue, gas, and added (247 F. 2d at p. 903):

> But be this as it may, the legal determination of the question rests not upon the parties' use of the word "manufacture", but upon the actual disposition of the gas.

In addition to the above considerations, the character of sales by Houston and Lo-Vaca is shown, by the nature of El Paso's operations. El Paso is engaged in an enterprise extending from Texas to California and

from Mexico to Canada. The record in this case shows that its gas produced or purchased in Texas goes to a number of possible destinations. Some is consumed in Texas, but most of it is transported out of the state in El Paso's pipeline system to be consumed in pipeline facilities or resold in New Mexico, Arizona or California. The contractual provisions, of course, do not alter these physical facts. Neither is the situation altered by El Paso's proposal to build a 16-inch line west from its Keystone compressor station so that there would be a line wholly in Texas by which fuel could reach its Texas compressor stations, for the Houston gas commingled with other gas in El Paso's main line would physically move

out of Texas although some portion might travel through the proposed 16-inch line.

The way in which El Paso operates its system in transporting its gas from the sources of supply to the points where it is needed as discussed in part above, demonstrates that the system must be considered as a whole and that it has the primary purpose of moving gas from the Permian Basin and other sources to consumers in a number of states. In *El Paso Natural Gas Co.*, 22 FPC 260, 277, 278,[3] we found that El Paso operated as integrated natural gas pipeline system and that it would be discriminatory to determine just what gas goes to each of the several customers. In our opinion the sale of gas to this interstate system, which would be used for system purposes and, at least in part, would leave the state and be sold for resale and consumed outside the state, would be subject to our jurisdiction. The situation may be compared in reverse to our decision in the *Penn Water* case.[4] There we found that sales in Pennsylvania by an integrated electric system were sales in interstate commerce and subject to our jurisdiction, although part of the energy sold had been generated in the same state. The gas to be sold to El Paso by Lo-Vaca and Houston would be isolated only by the terms of the contracts but actually would become system gas along with the gas of other producers who did not receive this constractual treatment.

While the El Paso system provides a good example of an integrated system and this fact supports our conclusion here, we would reach no different result if the sales were

---

[3] Remanded on other grounds as *El Paso Natural Gas Co.* v. *F.P.C.*, 281 F. 2d 567, (CA5) certiorari denied 366 U.S. 912.

[4] 8 F.P.C. 1, affirmed as *Pennsylvania Water and Power Co.* v. *F.P.C.*, 343 U.S. 414; see also *Kentucky Natural Gas Corp.*, v. *P.S.C.*, 28 F. Supp. 509 (D.C.E.D. Ky.), aff'd 119 F. 2d 417 (CA6).

to a single line system where physically the gas was mixed with other system gas and was physically transported out-of-state and sold in interstate commerce for resale. In this hypothetical situation, the gas sold would still be transported from one state to another and sold for resale, regardless of attempts by the parties, in their agreements with each other, to isolate and exclude such gas from our jurisdiction. As shown by the cases cited above, the touchstone to the question whether a sale of gas is for resale in interstate commerce is what is done with the gas, not what the parties may say about the transaction, verbally or in writing. Again we may say that the parties are not prevented by our conclusions here from entering into private arrangement with respect to the division of the gas or the ownership of the gas, but these arrangements will not prevent our jurisdiction attaching.[5]

1111

If we reached a conclusion different from that above, our regulation of gas rates would be handicapped. It would be possible, as in this case, for a pipeline to offer to purchase gas at a higher price than we would otherwise allow in the area upon the assertion that it would use this gas in its compressors or would deliver it to its intrastate customers even though the gas would actually be received into its general system transportation facilities and used for every system purpose. It would be possible for a pipeline to discriminate among producers by giving certain ones the privilege of selling to it the gas which by agreement would be deemed to be segregated from the interstate stream and to be resold and consumed in the state of production or used in compressor stations. This may increase the cost to interstate customers and at the same time put them at a com-

[5] Of course, what effect, if any, such arrangements would have on the issuance of certificates, and allocations and rates is not before us.

petitive disadvantage in obtaining additional supplies of gas. While our jurisdiction is limited by the Natural Gas Act, and not by the wider scope of the Constitution, we may note that the sales contemplated here could not properly be regulated by the producing state. They would be sales that concern "more states than one"[6]; they would concern Texas but also New Mexico, Arizona and California and the distribution of the gas to the public whom the Natural Gas Act was designed to protect.

A number of cases have been cited in the briefs of the various parties in support of their contentions but they do not disturb our conclusions. In *U.S.* v. *Public Utilities Comm'n.*, 345 U.S. 295, we had found that a sale of electric energy by a California company to the Navy at an installation in Nevada was subject to our jurisdiction even though the greater part of the energy was to be consumed by the Navy (and would thus have been exempt from our jurisdiction if it had been a separate transaction) and only a small part was to be resold. The Supreme Court suggested that a separation of the resale and direct sale energy might have been achieved, although that did not show in the record. In this respect the case does not involve an interstate commerce question at all, but a possible segregation between a direct sale and resales. It does not concern the operation of an interstate pipeline, but merely the final consumption and distribution of the electric energy. Moreover, the Commission's jurisdiction was sustained. A similar problem was involved in *City of Hastings* v. *F.P.C.*, 221 F. 2d 31 (CADC), certiorari denied 349 U.S. 920, where the court affirmed us in finding that the direct sale of gas to the city for use in its power plant was not subject to our jurisdiction, although commingled with gas sold to the city for resale, where the direct sale gas had been excluded by

[6] *Gibbons* v. *Ogden* 9 Wheat 1, 194

the terms of the rate schedule applicable to the resale gas. In both these cases the gas or electric energy for the alleged direct sales was to be consumed in the state of sale for local purposes, while Houston's and Lo-Vaca's gas would be sold to a pipeline system to enable it to carry on its interstate business.

1112

The *North Dakota* case[7] presents the most serious problem of distinction. Whether or not that case was rightly decided is an open question.[8] In that case, we found that we did not have jurisdiction over "firm sales" of gas in North Dakota by certain producers to Montana-Dakota Utilities Company. The gas was produced in North Dakota and by contract was to be used in that state. Montana-Dakota was to use part of this firm gas to serve several communities from its line which extended westward into Montana. It was commingled in this line with "dump" gas sold by the same producer to Montana-Dakota under separate contracts to be used in North Dakota and Montana. All of this gas came from one compressor station and was not mixed with other gas from other North Dakota sources. Thus it was possible to measure the intrastate and interstate volumes attributable to the source.

The *North Dakota* case presents a far more limited situation with a single source of supply within the state than that presented here. As can be seen from the citations set forth earlier in this opinion, it runs counter to the whole stream of the decisions of this Commission as to what constitutes a jurisdictional sale in interstate commerce and to the decisions of the Supreme Court construing this and

[7] *Montana-Dakota Utilities Co., et al.*, 16 FPC 415 affirmed as *North Dakota v. F.P.C.*, 247 F. 2d 173 (CA8).

[8] See *Oklahoma Natural Gas Company*, 23 FPC 291, discussed below, where the Commission also declined to follow the case.

other legislation. To the extent that *North Dakota* may be inconsistent with the action we take here, we believe it was erroneously decided.

In *Oklahoma Natural Gas Company*, 23 FPC 291, 531, we found that a sale by Oklahoma Natural to Consolidated Gas Utilities Corporation where the gas would be delivered into Consolidated's interstate pipeline in Oklahoma would be subject to our jurisdiction even though the companies agreed that an equivalent amount of gas would always be delivered by Consolidated to its customers in Oklahoma. It was, of course, clear that physically some of Oklahoma Natural's gas would be transported in Consolidated's pipeline outside of Oklahoma for resale. We thus held there, as we hold here, that a sale of gas in interstate commerce for resale cannot be transmuted into something else by contractual provisions.

In its exceptions Lo-Vaca contends that the examiner termed it a "pipeline company" in addition to being a "natural gas company". Lo-Vaca proposes to build a system of lines which will receive the gas from the producers, transport it and deliver it at Coquat, but the record is not sufficient to determine here whether it is a "pipeline company" in addition to being a natural gas company and it is not necessary to do so. However, on the basis of such facts as appear in the record, it would appear that both Lo-Vaca and Houston would be pipeline companies.

1113

The Commission further finds

(1) El Paso is engaged in the transportation of natural gas in interstate commerce and in the sale in interstate commerce of natural gas for resale for ultimate public consumption, and is a pipeline company and a "natural

gas company" within the meaning of the Natural Gas Act, as heretofore found by the Commission.

(2) El Paso Gas Supply Company upon the completion of the facilities proposed in Docket No. CP60-101 and the commencement of the sales proposed herein by Lo-Vaca and Houston would be engaged in the transportation of natural gas in interstate commerce, and would be a pipeline company and a "natural gas company" within the meaning of the Natural Gas Act.

(3) The sale and delivery of natural gas by Lo-Vaca and Houston as hereinabove described, and as further described in the record and in the application, would result in Lo-Vaca and Houston being engaged in the transportation of natural gas in interstate commerce, and in the sale in interstate commerce of such gas for resale, and Lo-Vaca and Houston thereby would become natural gas companies within the meaning of the Natural Gas Act, and their respective sales to El Paso would be subject to our jurisdiction.

(4) The natural gas facilities proposed to be constructed and operated by Lo-Vaca and Houston, are to be used in the transportation and sale of natural gas in interstate commerce, and hence would be subject to the jurisdiction of the Commission and to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

The Commission orders

(A) Lo-Vaca's request that the examiner's decision be modified so as to find it would not be engaged in the sale of gas for resale in interstate commerce is hereby denied.

(B) Houston's petition for a declaratory order that neither it nor the sellers of gas to it would be natural gas companies subject to the Commission's jurisdiction under the Natural Gas Act on account of the proposed transactions described above is hereby denied.

(C) Exceptions not granted herein are hereby denied.

(D) The examiner's decision, as modified and to the extent that it is consistent with our findings and order herein is hereby adopted as the decision of the Commission.

By the Commission. Commissioner O'Connor, dissenting in part, filed a separate statement.

J. H. GUTRIDE
Joseph H. Gutride,
Secretary.

(SEAL)

1114

Docket No. CI60-693
LO-VACA GATHERING COMPANY

Docket No. CP61-177
HOUSTON PIPE LINE COMPANY

(October 23, 1961)

O'CONNOR, Commissioner, *dissenting in part*:

Since, in my opinion, the Presiding Examiner's decision should be adopted by the Commission as its decision herein, I dissent from the modification thereof.

In modifying the Presiding Examiner's decision, the majority recognizes that its opinion and order are inconsistent with *State of North Dakota, et al.* v. *F.P.C., et al.*, 247 F. 2d 173 (CA8-1957). Their opinion states that:

> "To the extent that the *North Dakota* case may be inconsistent with the action which we take in the instant case, we believe that it was erroneously decided."

The Court of Appeals stated the basis of its *North Dakota* decision as follows (p. 177):

"... As found by the Examiner and approved by the FPC, the gas received . . . at Tioga, North Dakota, is broken into two streams, one of which moves eastward in the Tioga-Minot, North Dakota, intrastate line. Clearly that is and can only be intrastate transportation not subject to FPC control. The other stream moves westward [into Montana-Dakota's integrated system, p. 175] but *before crossing any state line* a small portion of it goes off into the laterals serving the four North Dakota towns of Ray, Wheelock, Epping and Springbrook. The gas going into the Tioga-Minot intrastate line and to the four named North Dakota towns is *bought and paid for under the 'firm gas' contracts.* We think, then, the gas sold pursuant to such 'firm gas' contracts for consumption in North Dakota is clearly distinguishable from the 'dump gas' sold in interstate commerce. There is no commingling of interstate with intrastate gas within the State of North Dakota *in the sense of loss of identity because the intrastate gas going to the four North Dakota communities named is separated from the gas stream in the main line and metered before any portion of the gas stream has left the State of North Dakota.* Accordingly, the *quantities* of intrastate gas purchased by Montana-Dakota under the 'firm gas' contracts are easily identifiable and determinable." (Emphasis supplied.)

1115

In that case, as in the Presiding Examiner's decision herein, the metering off within the producing state of the contract quantities of intrastate gas before any of the gas stream had crossed a state line was held to be a clearly distinguishable separation despite the commingling thereof in said stream with other locally produced gas destined for interstate transportation and sale.

As to such commingling, the Court said in *North Dakota* (P. 176):

> ". . . The fact that this ['firm'] gas travels over the Tioga-Williston line in one stream, along with the gas purchased under the 9¢ 'dump gas' interstate contracts does not convert the 16¢ 'firm gas' contracts into interstate contracts."

Obviously, under the physical flow theory applied by the majority herein, some molecules of the 'firm gas' in the stream in the *North Dakota* case flowed into Montana for resale and the 'firm gas' contracts thus could not have been held to be outside our jurisdiction. Hence, the necessity for them to depart herein from the judicial precedent established by the *North Dakota* case. To such a departure, I am opposed.

I agree with the majority that the expense of gas purchased for compressor use by interstate pipeline companies, as well as all other expenses of these companies, should be subject to our review and possible disallowance for rate-making. However, I do not feel that the necessity for such review of these relatively small amounts of gas requirements is sufficient cause for the development of such a broad policy as that enunciated by the majority in this case.

In my opinion, the decision of the majority would effectively preclude the use of interstate pipeline company facilities for intrastate transmission of natural gas within the producer states for the use of the consumers and industries in those states without the producers of such gas being subject to the jurisdiction of the Federal Power Commission. It seems to me this is an unnecessarily harsh imposition on the consumers in the producing states whose resources and statutes have been availed of to permit the construction and operation of these interstate lines. There

may be good and sufficient reasons (not the least of which is the cost of complying with regulatory reporting requirements) for many producers to avoid subjecting themselves to the jurisdiction of the Federal Power Commission.

1116

It appears to me that the advantages to interstate pipeline companies of the flexibility in disposing of surplus supplies of gas in intrastate commerce, as well as the potential usefulness of these lines in providing intrastate transportation revenues, far outweigh the possibilities of additional costs to interstate consumers.

L. J. O'Connor, Jr., *Commissioner*

1117

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

In the Matter of

Docket No. CI60-693
Lo-Vaca Gathering Company

Docket No. CP61-177
Houston Pipe Line Company

Application of Houston Pipe Line Company for Rehearing

Introduction

Pursuant to Section 19(a) of the Natural Gas Act (Act of June 21, 1938, 52 Stat. 821, as amended), 15 U.S.C. 717r(a) and to Section 1.34 of the Commission's Rules of Practice and Procedure, 18 CFR Section 1.34, Houston Pipe Line Company (Houston) hereby petitions the Commission to modify without further hearing the opinion and order determining the jurisdiction issued herein on October 23, 1961 in the manner and to the extent hereinafter set forth.

Specification of Errors

Houston respectfully submits that in and by the aforesaid opinion and order determining jurisdiction (Opinion No. 348), the Commission erred in each and all of the following respects:

1. The Commission's action is arbitrary and not in accord with the law.

2. The Commission's action is arbitrary and not in accord with the uncontroverted evidence of record.

3. The Commission in issuance of the order accompanying Opinion No. 348 has exceeded its jurisdiction.

GROUNDS FOR REHEARING

A. The Commission's Action is Arbitrary and Not in Accord With the Law.

The Commission in its Opinion No. 348 issued October 23, 1961 in the above-captioned proceedings determined that its jurisdiction attaches under the Natural Gas Act (Act) for the proposed sales of natural gas by Lo-Vaca Gathering Company (Lo-Vaca) and Houston to El Paso Natural Gas Company (El Paso) in stated consideration by the Commission of "physical commingling, the actual destination of the gas, and the operations of El Paso's system." This conclusion by the Commission was reached despite the contractual arrangements, operational ability and intention of the parties to segregate such volumes from a stream in interstate commerce.

1. *The Commission erred in construing Sections 1(b) and 2(7) of the Act as it applies to Houston*

The Commission in its Opinion No. 348 states that such opinion "relates only to what constitutes interstate com-

merce and our jurisdiction under the Natural Gas Act." (Mimeo, p. 5). Its determination in this respect, however, to the effect that jurisdiction attaches to the proposed sale by Houston to El Paso must be considered to be exclusively grounded upon and limited to the exercise of the jurisdiction conferred upon it under the Act and specifically Sections 1(b) and 2(7) thereof. Section 1(b) of the Act provides in part:

"(b) The provisions of this Act shall apply to the *transportation* of natural gas in *interstate commerce*, to the sale in interstate commerce of natural gas *for resale* for ultimate public consumption . . . and to natural-gas companies engaged in such transportation or sale, *but shall not apply to any other transportation* or sale . . ." (Emphasis Added)

Section 2(7) of the Act provides in part:

"(7) 'Interstate commerce' means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof. . . ."

The basis for the Commission's determination of jurisdiction turns entirely on the following conclusion: (Mimeo. p. 5):

". . . It is clear enough that physically the specific gas sold by . . . Houston would actually in part be resold to customers outside of Texas and it would be physically impossible to restrict the consumption of this gas to El Paso's facilities either inside or outside the state . . . Thus, literally, the gas sold by Houston . . . would come within the meaning of the statute as sold in interstate commerce for resale."

(1119)

Houston respectfully submits this legal conclusion is erroneous within the meaning and intent of the statute. The fact of physically commingling of the intrastate gas volumes with gas volumes eventually destined for interstate deliveries does not thereby transform the entire composite volume being transported to an exclusively interstate character prior to transmission out of the state of production and purchase. *Peoples Natural Gas Company* v. *The Public Service Commission of Pennsylvania*, 270 U.S. 550.

1120

In the *Peoples* case, the company produced its own gas in Pennsylvania which was commingled with gas produced in West Virginia and purchased by Peoples at the state border. The commingled stream was distributed by Peoples in Pennsylvania. At page 555, the Supreme Court said:

> "As respects the Pennsylvania gas, we think it must be held to be in intrastate commerce only. Feeding it into the same pipelines with the West Virginia gas works no change in this regard. Of course after the commingling the two are indistinguishable. But the proportions of both in the mixture are known and that of either readily may be withdrawn without affecting the transportation or sale of the rest. So for all practical purposes the two are separable, and neither affects the character of the business as to the other."

The Supreme Court accordingly held that the gas produced and distributed in Pennsylvania, although commingled, were transactions in intrastate not interstate commerce. Here, applying this test, the proportions of the proposed sale by Houston with the purchase volumes by El Paso from other sources within the State of Texas are definitely known through metering, as in the *Peoples* case, although commingled. The sales volumes of Houston may be readily

determined and are proposed to be entirely withdrawn in Texas from the commingled stream without in any way affecting the transportation or sale of other gas volumes purchased by El Paso from others.

Section 1(b) of the Act provides that a direct sale for consumptive use by the purchaser is not a sale for resale over which the Commission has jurisdiction, nor does the Commission have jurisdiction over the transportation of natural gas when it is consumed by the

purchaser in the same state in which it is produced. The specific provision of that Section of the Act providing that jurisdiction shall not attach to any sale other than those therein enumerated have been held to plainly mean that the Act shall not apply to any sales other than sales "for resale for ultimate public consumption, for domestic, commerical, industrial or any other use. Direct sales for consumptive use of whatever sort were excluded." Cf. *City of Hastings, Nebraska* v. *Federal Power Commission*, 221 F. 2d 31, *cert.* denied 349 U.S. 920.

Moreover, the definition of interstate commerce as contained in Section 2 of the Act is clear and unambiguous. The fact that physical commingling of intrastate and interstate gas in the state of production renders it impossible to ascertain with complete certainty that some molecules of the intrastate gas may be transported from one state to another is not determinative. It clearly does not constitute "commerce between any point in a state and any point outside thereof," for no loss of identity of the intrastate gas occurs. Cf. *State of North Dakota, et al.* v. *FPC, et al.*, 247 F. 2d 173; dissent in Opinion No. 348.

2. The Commission erred in construing the established case law.

Houston respectfully submits that the analysis of the majority in Opinion No. 348 with respect to cited decisions related to interstate commerce matters is not well taken here. The cases therein relied upon in each instance involve considerations of interstate commerce from the aspect of unrestricted commercial intercourse between peoples in different states. Here it is undisputed that the evidence establishes the following:

(a) The gas purchase agreement of July 19, 1960 between Houston and El Paso provides for the delivery of 70,000 Mcf on an average day and further provides that such gas to be purchased by El Paso "shall be used and consumed by El Paso solely as fuel in the operation of El Paso's plants and in the gasoline plants of Phillips Petroleum Company in Ector County, all located within the State of Texas," and additionally provides that El Paso "would not take from Houston a quantity of gas in excess of the quantity required for fuel in Texas." (Opinion No. 348, Mimeo. pp. 2, 3).

(b) The facilities in Texas which would be fueled with Houston's delivery volume are such as to require volumes of fuel gas in excess of that to be supplied by Houston on both an average day and a maximum day. (Opinion No. 348, Mimeo. p. 3).

The correct state of the law governing in these circumstances is that which the majority cited and sought to distinguish in *Montana-Dakota Utilities Co., et al.*, 16 FPC 415, affirmed as *North Dakota* v. *FPC*, 247 F. 2d 173. Here as in *North Dakota*, "there is no commingling of interstate with intrastate gas . . . in the sense of loss of identity be-

cause the intrastate gas is separated from the gas stream in the main line and metered before any portion of the gas stream has left the State . . . Accordingly, the quantities of intrastate gas purchased . . . are easily identifiable and determinable."

B. The Commission's action is arbitrary and not in accord with the evidence of record

As cited heretofore, *supra*, p. , the Commission's opinion as to the jurisdictional status of the Houston-El Paso proposal seems

1123

to rest on the evidentiary conclusion that:

> "It is clear enough that *physically* the *specific* gas sold by . . . Houston would actually in part be resold to customers outside of Texas and it would be *physically* impossible to restrict the consumption of this gas to El Paso's facilities either inside or outside the state."

Houston submits that the "physical" test of "specific" gas molecules is legally misplaced, as has been demonstrated by the applicable law discussed in the foregoing part. Equally significant, the Commission's conclusion is not consistent with the facts established by the evidence.

1. *The evidence of record does not support the proposition that all restricted use volumes would not be consumed in the state in which purchased*

The evidence, pertinent to decision of the jurisdictional question, produced at the hearings may be briefly summarized as follows. All of this restricted use gas is produced in Texas (R. 128, 26). It will be commingled in El Paso's line after accurate metering thereof at the point of

delivery, transported to Sonora and further thereafter transported through existing and proposed facilities commingled with other Texas produced gas (R. 114, 118, 122). El Paso will at all times utilize from the common stream an amount for fuel for its plants in Texas and for the Phillips plant in Texas in excess of the amount purchased and received from Houston (R. 128, 343). Fuel uses at all of such plants will be separately metered (R. 125, 126, 128, 181, 328, 343). This is the only way to determine the fuel uses as, following commingling, one cannot either prove or disprove that a particular molecue of gas was so employed or remained in the commingled stream (R. 344). It should

be recalled, parenthetically, that metering is the accepted and standard method for determing non-jurisdictional pipeline sales effected from the common stream. The existing and proposed pipelines of El Paso which will be utilized to transport the Houston gas to points of ultimate consumption thereof at plants wholly within the State of Texas as well as the locations of those plants and the Phillips plant all within the State of Texas are graphically portrayed in Exhibit 6. Not all of El Paso's existing plants in Texas will be so employed and such other plants could, if necessary, consume portions of the Houston gas as fuel (R. 138, Exh. 6). It is thus apparent that through existing and proposed facilities Houston's Texas produced gas may be transported wholly within Texas in a continuous flow downstream from the delivery point and delivered to designated existing and proposed plants, all within the State of Texas, without any of the commingled stream of only Texas produced gas ever leaving the State of Texas or having injected therein any gas produced in any state other than Texas (Exhibit 6, R. 139, 140). The specific existing and proposed plants of El Paso in Texas in which Houston gas

will be consumed as fuel are identified (Exhibits 7 and 8, R. 141). The actual fuel requirements of such plants and the estimated fuel requirements of the proposed plants on both an average and a peak day appear on the flow diagrams, Exhibits 7 and 8. The directions of the flow on each of such days is shown by the red arrows, particularly identifying the flow of the Houston restricted use gas. It is evident therefrom that the Houston gas will flow only in Texas (Exhibits 7 and 8, R. 145-147). It thus conclusively appears that on both the average and peak day the fuel requirements of the specified plants exceed by wide margins the volumes of gas

to be purchased by El Paso for such use from Houston (Exhibits 7 and 8, R. 149-150). It thus appears that through existing and proposed facilities El Paso can and will perform its contract obligations with Houston (R. 148). El Paso can and will so perform even on a minimum day. No exhibit was submitted respecting minimum day fuel requirements of these plants or a flow diagram applicable to such a day because of the difficulty of accurately determining a minimum day because of the possibility of equipment failure (R. 341). At all times, however, even on a minimum day, the Houston restricted use gas will be used only for fuel in the specified plants strictly in accordance with the respective contract provisions (R. 158). El Paso at all times and even on a minimum day can and will regulate its takes from Houston to assure that it takes from neither any greater quantities than it will burn as fuel in the plants at which it will consume the respective gases. Only such quantities and no more will ever be taken. El Paso has the means to assure this and be on the safe side (R. 356). The aforesaid flow diagrams were augmented by flow diagrams showing El Paso's Southern system

design capacity and its Permian field design capacity (Exhibits 9 and 10). Detailed engineering design data are shown to demonstrate, after operation of this project, the capacities of the two systems to accept deliveries of the restricted use gas of Houston, to transport it as contractually required, to deliver it to the specified plants at which it will be consumed as fuel, and otherwise to perform El Paso's contractual obligations (R. 159). El Paso will do whatever is required to perform its contract obligations (R. 266-267; 272, 307). Separate meters will be employed to accurately measure the quantities received by El Paso from Houston (R. 25, 343). Separate

meters will record the receipt of other Texas produced gas entering the gas stream and separate meters will record the deliveries to the plants at which the restricted use gas of Houston will be consumed as fuel (R. 343). Such metering is the only method by which direct sales for non-jurisdictional fuel consumption uses may be established. It is not possible to demonstrate on a molecular basis that particular molecules attributable to identified vendors were or were not so employed (R. 332, 343).

2. *Rearrangement of Station Piping.*

The Commission's order in Opinion No. 348 relies in large measure, seemingly, on the following conclusion (Op. 348, Mimeo. p. 3):

> "To give some semblance of physical delivery of Houston's gas to the existing stations, [in Texas], El Paso proposes to rearrange its station fuel piping at certain stations. This station fuel supply would connect to the main line by means of new supply laterals . . . since the plants are already supplied with

fuel, these new facilities are obviously unnecessary."[1] (Insert added).

1127

The true state of the record establishes the following:

In a few relatively minor and insignificant instances, proposed fuel lines will constitute duplicates of existing facilities (R. 354). Proposed construction of such duplicate facilities to accomplish the contractual obligations respecting restricted use for fuel is not relevant to the jurisdictional issue here presented. Moreover, duplication of facilities has been repeatedly held to be contrary to the public interest. Like the tendered cost evidence of the PUC of California and the Southern California Companies, properly excluded by the Presiding Examiner, the propriety of the construction of duplicating facilities should be an issue only in a later hearing. This record shows, additionally, that other existing plants in Texas could be specified. Duplicating of fuel lines might thus be avoided. Most importantly, when this project becomes operative, the quantities of gas now being consumed as fuel in existing plants and stations of El Paso will become available to the system and to the customers served thereby. There will be no cut back (R. 370). The necessary effect is an increase in system capacity in large amounts and access to the prolific reserves of South Texas. Title to the gases proposed to be delivered under each of these restricted use contracts passes to El Paso at the delivery point near Three Rivers, Texas, by the express provisions of each of the contracts. Houston in its contract warrants its title to and ownership of the gas prior to delivery thereof to

[1] At the outset it must be acknowledged that if adequacy of existing pipeline facilities to provide currently rendered service were to serve as the criteria for certificate determinations regarding future system expansions, the industry would perforce be required to remain static and Section 7(e) would be written out of the Act.

El Paso free of liens or incumbrances and further warrants its right to sell the gas to El Paso.

1128

C. The Commission Has Exceeded Its Jurisdiction.

1. *The Commission is bound by judicial precedent.*

The Commission's orders are subject to review and modification by United States Courts of Appeals, Section 19 of the Act. Similarly, the Commission is bound to adhere to the law as defined by such courts. It follows therefore that the Commission is not empowered to overthrow the law as thus declared. To do so as the Commission does here in its disposition of *North Dakota* v. *FPC*, 247 F.2d 173 (Mimeo. p. 10) is error of law and subject to correction. *U.S. ex rel. Rongetti* v. *Neely*, 207 F.2d 281 (1953).

D. Conclusion

Wherefore, by reason of the foregoing, Houston Pipe Line Company prays that the Federal Power Commission modify its opinion No. 348 and amend its order issued therewith by a disclaimer of jurisdiction over the proposal presented in Docket No. CP61-177.

Respectfully submitted,

Houston Pipe Line Company
By Jefferson D. Giller
Fulbright, Crooker, Freeman,
Bates & Jaworski
Bank of the Southwest Bldg.
Houston 2, Texas
Its Attorneys

1132

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

In the Matters of

Docket No. CI60-693

LO-VACA GATHERING COMPANY

Docket No. CP60-177

HOUSTON PIPE LINE COMPANY

Application of El Paso Natural Gas Company for Rehearing

El Paso Natural Gas Company (El Paso), an aggrieved party in the above-captioned proceedings by reason of the issuance on October 23, 1961 by the Commission of Opinion No. 348 and accompanying order entitled, "Opinion and Order Determining Jurisdiction", hereby petitions the Commission pursuant to Section 19(a) of the Natural Gas Act, as amended, 52 Stat. 821, 15 U.S.C. 717r(a) and to Section 1.34 of the Commission's Rules of Practice and Procedure to abrogate or modify such opinion and order on the following grounds.

A. *Specifications of Error*

El Paso respectfully submits that in and by the issuance of Opinion No. 348 and accompanying order, the Commission erred to the grievance and prejudice of petitioner in each and all of the following respects:

1. The Commission's action in the issuance of Opinion No. 348 and accompanying order is arbitrary and is in violation of the law.

2. The Commission's action in the issuance of Opinion No. 348 and accompanying order is capricious and is contrary to the established

evidence of the record.

3. The Commission's action in the issuance of Opinion No. 348 and accompanying order is an exercise of authority and of jurisdiction beyond that delegated and provided under the Natural Gas Act.

B. *Brief Restatement of the Cases*

On March 15, 1960, El Paso and Lo-Vaca Gathering Company (Lo-Vaca) entered into a restricted use gas purchase agreement covering gas produced in South Texas deemed by the parties thereto not to be subject to this Commission's jurisdiction (Art. X, Sec. 2, p. 14) because of the provision in Article XVI of said contract providing that all of the gas to be purchased thereunder shall be used by El Paso solely as fuel in its compressors, treating plants, boilers, camps and other facilities located outside of the State of Texas, although such gas will be commingled with other Texas produced gas being transported in El Paso's pipeline system.

On May 16, 1960, these parties entered into another gas purchase contract covering gas produced in South Texas, the use of which by El Paso was unrestricted and which, concededly, is a sale for resale in interstate commerce and subject to the Commission's jurisdiction (R. 21). On July 19, 1960, El Paso and Houston Pipe Line Company (Houston) entered into a restricted use gas purchase agreement covering gas produced in South Texas (Ex. 2) deemed by both parties to be exclusively intrastate in character and beyond the Commission's jurisdiction (Art. XVII, Sec.

17.1, p. 32). The restrictive use limitations are set forth in Art. II, Sections 2.1 and 2.2, pages 4 to 5.

1134

Briefly, the restrictive clauses provide in substance that the gas so sold will be used and consumed as fuel in El Paso's plant, defined in Art. I, Section (i), page 4, located in Texas. It was recognized that Houston's gas so utilized for fuel consumption within Texas must necessarily be commingled with other Texas produced gas being transported by El Paso in its pipeline system. El Paso covenanted that the gas so purchased from Houston shall be used and consumed by El Paso solely as fuel in the operation of its plant and in the gasoline plant of Phillips Petroleum Company in Ector County, all located wholly within the State of Texas; that at no time will El Paso take from Houston a quantity of gas in excess of the quantity being consumed at the same time in Texas by El Paso for the agreed uses; that, such volumes will at all times be separately metered when introduced into the El Paso system and separately metered at the points of outlet for fuel usage; that all components of El Paso's plant consuming Houston gas shall physically be located on its system of pipelines and laterals within Texas through which the flow of gas, although commingled with other gas, shall at all times be continuous and downstream from the point of delivery near Three Rivers, Texas; that a sufficient volume of the commingled stream shall by said physical connections reach and pass into components of El Paso's plant located in Texas which consume in the aggregate a volume of gas as fuel equal to or greater than the volumes of gas contributed into the commingled stream at Three Rivers by Houston and that El Paso will retain for six years the meter reading charts to enable proof of the

quantities delivered by Houston and the quantities consumed as fuel.

Lo-Vaca filed its certificate application disclaiming Commission jurisdiction over its restricted use contract (Item A by reference, R. 22). Houston filed no such application. The Commission, by letter dated October 19, 1960, requested the positions of all parties to the project respecting both restricted use contracts. Lo-Vaca replied by letter of November 25, 1960 (R. 22). Both El Paso and Supply Company replied thereto by letters dated November 25, 1960 with exhibits consisting of flow diagrams and schedules (Items C and D by reference, R. 309). Houston replied, on December 15, 1960 setting forth its position of non-jurisdiction by a narrative of the facts and a discussion of the applicable law, citing the same legal authorities relied upon by El Paso in its said reply. Thereafter, Houston, on December 27, 1960, filed its petition for a declaratory order to remove uncertainties as to the Commission's jurisdiction over its proposed sale to El Paso and for a declaration of non-jurisdiction. On February 24, 1961, the Commission issued its order for hearing on the limited question of its jurisdiction over the restricted use contracts of both Houston and Lo-Vaca and consolidated the proceedings for hearing. On March 15, 1961, El Paso was granted intervention in the consolidated proceedings.

The Examiner's intermediate decision issued August 11, 1961 holding that Lo-Vaca would be engaged in the transporation and sale for resale in interstate commerce; that under the proposal of Houston, it would not be engaged in interstate activity and therefore would not be a natural gas company within the definition of the term in the Act. The Commission's Opinion No. 348 and accompanying order to which this

application for rehearing is addressed reversed the Presiding Examiner to the extent that both proposed operations of Houston and Lo-Vaca were subject to its jurisdiction under the Natural Gas Act and upon commencement of such proposed operations, both applicants would be "natural-gas" companies within the meaning of the term in the Act.

C. *Grounds for Abrogation and Reversal of Opinion and Order*

1. The Commission's action is arbitrary and is in violation of the law.

The Commission presents the sole question for disposition in these proceedings to be (mimeo., p. 5)

> ". . . The question before us is whether contractual arrangements and the intention of the parties can segregate Lo-Vaca's and Houston's gas sold to El Paso from other gas received by El Paso regardless of *physical commingling, the actual destination of the gas, and the operations of El Paso's system.* In our opinion, as discussed below, such a segregation would not be achieved here and both sales would be subject to our jurisdiction . . ." (Emphasis Supplied).

The state of the law does not support the Commission's disposition of this fundamental question as is developed hereinafter.

2. The Law on the Question.

If Houston's Texas produced gas were not commingled in Supply Company's pipeline with both streams of Lo-Vaca's Texas produced gas, one concededly jurisdictional

and the other destined for transport across the Texas border for fuel use beyond Texas and were not further commingled in El Paso's facilities beyond Sonora with other Texas produced gas destined for movement in interstate commerce for resale, no one

1137

could seriously contend that Houston's restricted use gas was jurisdictional. In such event, the transaction would be merely the intrastate transportation within the State of Texas of Texas produced gas for consumption as fuel at plants located entirely in Texas. Metering is legally sufficient to establish the identity and separability of the portion from the gas stream consumed at each plant. Similarly, if Lo-Vaca's restricted use gas were not commingled with its jurisdictional gas and with Houston's restricted use gas in Supply Company's pipeline and were not further commingled beyond Sonora with other Texas produced gas destined for movement in intersate commerce for resale, no one would seriously question the non-jurisdictional character of such a transaction. It would, under such an assumption, be merely the transportation of Texas produced gas in interstate commerce but not for resale for ultimate public consumption. Once again, metering would suffice to establish the identity of and preserve the non-jurisdictional character of the transactions of sales to the different plants beyond Texas, Commingling, then, is the nub of the jurisdictional question. Stated simply, the question becomes, does the transportation of non-jurisdictional gas lose its identity and non-jurisdictional character and become jurisdictional merely because in such transporation it is commingled with jurisdictional gas? We submit that the correct answer is "no."

Mere commingling of non-jurisdictional gas with jurisdictional gas does not cause the former to lose its identity

and to become jurisdictional where the proportion of both in the mixture after commingling are known through metering and where they are the subject of separate sales under separate contracts and where, through metering, the quantities so sold for non-jurisdictional uses can be established at all times. All of these factors are present in the facts here presented.

1138

The Supreme Court of the United States has unequivocally held in *Peoples Natural Gas Co.* v. *Public Service Commission of Pa.*, 270 U.S. 550, that mere commingling of intrastate gas with gas destined for out of state consumption does not cause the commingled gas stream to become the subject of interstate commerce. Peoples produced its own gas in Pennsylvania which was commingled with gas produced in West Virginia and purchased by Peoples at the state border. The commingled stream was distributed by Peoples in Pennsylvania. At page 555, the Supreme Court said:

> "As respects the Pennsylvania gas we think it must be held to be in intrastate commerce only. Feeding it into the same pipe lines with the West Virginia gas works no change in this regard. Of course after the commingling the two are undistinguishable. But the proportions of both in the mixture are known and that of either readily may be withdrawn without affecting the transportation or sale of the rest. So for all practical purposes the two are separable, and neither affects the character of the business as to the other."

The Supreme Court, accordingly, held that the gas produced and distributed in Pennsylvania, although commingled, were transactions in intrastate not interstate commerce. Here, applying this test, the proportions of both the proposed sales by Houston and Lo-Vaca

are definitely known through metering as in that case, although commingled, and that of Houston readily may be and is proposed to be withdrawn from the commingled stream without in any way affecting the transportation or sale of the gas proposed to be sold by Lo-Vaca. They are, therefore, severable and neither affects the character of the other. The gas proposed to be sold by Houston thus retains its intrastate character even though commingled with all the Lo-Vaca gas and Lo-Vaca's restricted use gas retains its

non-jurisdictional character although commingled with Lo-Vaca's jurisdictional gas.

The holding of the Supreme Court in *Peoples Natural, supra*, is still the law. It was not overruled by the later decision in *Pennsylvania Water and Power Company* v. *Federal Power Commission*, 343 U.S. 414. The factual situations presented in these two cases are totally different and readily distinguishable. In *Penn Water*, the energy produced by the companies concerned was not constant and at all times separable so that energy generated in one state was always sold in that state. There was a complete integration and pooling of the power producing and transmission facilities of all three companies. Depending upon the flow of the river, power used in Pennsylvania would be either generated in Pennsylvania or in Maryland and transported to Pennsylvania. Penn Water's sales in Pennsylvania were not, therefore, sales only of the output of its own plant in Pennsylvania but were sales of the output of the integrated and coordinated interstate electric system of which Penn Water's facilities were an integral part. The Supreme Court upheld the Commission's jurisdiction over the operations of such an integrated and coordinated interstate electric system. Here, however, no such inte-

grated and non-severable and non-identifiable situation is presented. *Penn Water, supra*, therefore, neither expressly nor impliedly overruled *Peoples Natural, supra*, and can constitute no authority for a determination that either the Houston or Lo-Vaca restricted use gas is jurisdictional.

In *Penn Water*, there was and could be, because of the coordinated and integrated interstate operation, no separate sale of locally produced energy for local transmission and consumption under separate contract in intrastate commerce. This

completely distinguishes the facts here presented from those there presented.

The later Supreme Court decision in *United States* v. *PUC of California*, 345 U.S. 295 made crystal clear the reason for its decision in *Penn Water, supra*, when it said at page 317:

> "The impossibility of separating interstate from intrastate electricity consumed by each purchaser is patent. In such a case, federal rate jurisdiction must attach to each distributor's negotiated agreement with the seller irrespective of occasional and unpredictable use of non-jurisdictional intrastate power."

The Supreme Court further, in this decision, in effect reaffirmed the doctrine of severability of non-jurisdictional gas from the commingled stream and announced the factors which, if present as here, enables the gas to retain its non-jurisdictional character although commingled with jurisdictional gas when it said at page 318:

> "Assuming respondents' theory, this would turn, of course, on whether an essentially separate transaction covering the power directly consumed by the purchaser is identifiable. The present record will not permit

such a finding. It may be that as an engineering proposition, accurate measurement of the volume resold and the volume directly consumed by the two parties is possible for each billing period. But there is no record evidence of separate rates, separate negotiations, separate contracts or separate rate regulation by official bodies, in short that the 'sales' themselves were separate, and it is in these terms that the Act would require us to fix the limits of the jurisdictional grant. The attention of the Commission was not directed towards this matter."

Thus, the Supreme Court reaffirmed its earlier holding in *Peoples Natural, supra,* when, as here, separation of the non-jurisdictional from the jurisdictional gas under each gas purchase contract here in issue is possible. Then, neither affects the character of the other and Federal jurisdiction

1141

does not embrace the entire commingled stream from necessity because of impossibility of separation. Here, also, the contribution of the Houston and Lo-Vaca restricted use gases is neither occasional nor unpredictable. They are constant and predictable pursuant to specific provisions of the gas purchase contracts under which they are proposed to be sold.

The Supreme Court of Texas has also had occasion to uphold the non-jurisdictional and intrastate character of the shipment of oil produced in Texas although commingled with oil produced in New Mexico. See: *Humble Oil and and Refining Co.* v. *Texas and Pacific Railway Co.*, 289 S.W. 2d 547.

The recent decision of the United States Court of Appeals for the Eighth Circuit in *State of North Dakota* v. *Federal Power Commission*, 247 F. 2d 173 is dispositive of the issue here presented. The facts there presented are on

all fours with those here presented. This decision, we submit, requires a finding that Houston's gas is non-jurisdictional.

In that proceeding, the Commission approved the decision of the Presiding Examiner and held that it had no jurisdictional over the sales made by Signal and Amerada under the "firm gas" contracts based upon a finding that such contracts were clearly intrastate in nature. The court stated the question to be whether natural gas produced, wholesaled, transported and sold within the State of North Dakota became a proper subject for Federal regulation as being in interstate commerce because part of its transportation occurs in a commingled state with gas admittedly being transported to interstate commerce, the purchase contracts for such gas distributed within the state having been executed with each supplier one day prior to execution of the corresponding inter-

state "dump gas" contracts. The court quoted with approval from the decision of the Presiding Examiner, characterizing his finding as "eminently correct." (p. 176):

> "At the outset, it should be noted that this Commission clearly has no jurisdiction over the sales made by Signal and Amerada under the 16-cent 'firm gas' contracts. Under Section 1 (b) of the Natural Gas Act, this Commission has jurisdiction only over the transportation of natural gas in interstate commerce, or the sale in interstate commerce of natural gas for resale. It has no authority to regulate intrastate sales. The gas sold under the instant 16-cent contracts is admittedly produced and consumed wholly within the State of North Dakota both in the communities served from the Tioga-Minot line and in the communities served from the Tioga-Williston line. The conclusion that they are accordingly intrastate contracts is so obvious as to require no extended discussion. The fact

> that this gas travels over the Tioga-Williston line in one stream, along with the gas purchased under the 9-cent 'dump gas' interstate contracts does not convert the 16-cent 'firm gas' contracts into interstate contracts."

This appellate court, following the holding of *Peoples Natural, supra*, further confirmed our conviction respecting the non-jurisdictional character of the Houston gas when it stated at page 177:

> "There is no commingling of interstate with intrastate gas within the state of North Dakota in the sense of *loss of identity* because the intrastate gas going to the four North Dakota communities named is *separated* from the gas stream in the main line and *metered before any portion* of the gas stream *has left* the *state of North Dakota*. Accordingly, the *quantities* of *intrastate gas* purchased by Montana-Dakota under the 'firm gas' contracts *are easily identifiable* and *determinable*." (Emphasis Added)

Here, obviously, there is no loss of identity of Houston's intrastate

gas going to the compressors within the State of Texas for consumption there as fuel as it will be separated from the gas stream and metered before any portion of the gas stream shall have left the State of Texas. Accordingly, the quantities of this intrastate gas purchased by El Paso under its intrastate contract with Houston are easily identifiable and determinable.

Further support of our position is found in the decision of the United States Court of Appeals for the District of Columbia Circuit in *City of Hastings, Nebraska v. Federal Power Commission*, 221 F.2d 31, *cert. denied*, 349 U.S. 920. The holding there was that gas sold to a city for consump-

tion at its power plant for fuel, authough part of the transported commingled stream of gas included gas destined for resale, did not constitute a jurisdictional sale. The factors, hereinbefore noted, were again clearly detailed in this decision at page 36:

> "The entire course of dealings clearly permitted the Commission to find the existence of separate rates, separate billings, separate negotiations, separate contracts, separate allocation of gas and effective separate measurement facilities."

Each of these enumerated factors are here present and require the Commission to find that, by reason thereof, the Houston and Lo-Vaca restricted use gases are non-jurisdictional.

The Commisison has recently reiterated its holding in *Montana-Dakota*, affirmed on appeal *sub. nom. State of North Dakota, supra,* that because the non-jurisdictional gas was carried commingled with jurisdictional gas the former did not lose its identity as non-jurisdictional gas. This it did in the matter of *Oklahoma Natural Gas Company*. 23 FPC

291, 294. In that decision, the facts presented were carefully distinguished from those involved in *Montana-Dakota*. In *Oklahoma Natural*, as a result of the exchange agreement between Consolidated and Oklahoma Natural, there was proposed no increase in the amount of gas available to Consolidated. The Commisison concluded (p. 293) that because Consolidated has not increased its deliveries to its Oklahoma customers, Consolidated was attempting, by means of a contractual provision, to substitute Oklahoma Natural's gas for its *interstate* gas from Texas in making its Oklahoma deliveries. The facts here presented are the

antithesis of those there in issue. Here, by reason of the use of the Houston and Lo-Vaca restricted use gases for compression fuel, an equivalent amount of additional gas becomes available to El Paso for use by its customers. Moreover, a diametrically opposite factual situation existed in *Oklahoma Natural* than that here presented respecting the flow of the commingled gas stream and the points of takeoff therefrom. Consolidated's gas stream, with which the gas sold by Oklahoma Natural became commingled, had passed from Texas into Oklahoma and was thus in interstate commerce at the point of delivery of Oklahoma Natural's gas. Here, the gas stream has not left the State of Texas at every point of departure therefrom of Houston's gas. This was termed the "salient distinction" between the *Oklahoma Natural* and *Montana-Dakota* cases, (p. 296). Clearly, therefore, the *Oklahoma Natural* decision cannot be considered any authority for a finding that the gas of Houston is jurisdictional. For the foregoing reasons, it is respectfully submitted that such gas is patently non-jurisdictional and that the Commission should so declare.

1145

Lo-Vaca's contract of March 15, 1960 is asserted by it to be non-jurisdictional with which El Paso concurs. The foregoing authorities on separability, identity, measurements and use of this gas in intrastate commerce are equally applicable to the gas proposed to be sold under this contract. True, it is proposed to be transported in interstate commerce through the proposed facilities of El Paso Supply and El Paso Natural which gives the Commission jurisdiction over their transportation facilities. The sale proposed by Lo-Vaca, however, is not one in interstate commerce for resale for ultimate public consumption. The Commission possesses no jurisdiction, we submit, over this proposed sale under the plain language of Section

1(b) of the Act and the applicable authorities. *Panhandle Eastern* v. *PSC of Indiana*, 332 U.S. 507, 517.

City of Hastings, Nebraska, supra, is dispositive of this issue and, as well, requires a finding that this restricted use sale proposed by Lo-Vaca is non-jurisdictional. There the pipeline company, after gathering gas of its own production as well as purchases from other producers situated in Kansas, transported such gas into Nebraska where it was resold by direct sale for industrial usage in Nebraska. The court held the direct sale for such use to be non-jurisdictional, although the gas had been transported in interstate commerce by a natural gas company subject to the Commission's jurisdiction, because under Section 1 (b) of the Act a direct sale for consumptive use is not a sale for resale over which along the Commission has jurisdiction. Congress, the court noted, made sure that its intent could not be mistaken by adding the explicit prohibition that the Act "shall not apply to any other sale." Those words, said the court, plainly mean that the Act shall not apply to any sales

other than sales "for resale for ultimate public consumption, for domestic, commercial, industrial, or any other use. Direct sales for consumptive use of whatever sort were excluded." In summary, the court said. "The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive use." Admittedly, such Lo-Vaca gas will be sold directly to El Paso under the terms of this contract not for resale by El Paso for ultimate public consumption, but for consumptive use by El Paso to meet a portion of its compressor fuel requirements outside the State of Texas. The Gas so proposed to be sold to El Paso, for these reasons, must, accordingly, be held to be non-jurisdictional.

3. *The Commission's Action Is Capricious and Is Contrary to the Evidence of the Record.*

The Commission seemingly bases its determination of jurisdiction in these matters on the following conclusions of the evidence (mimeo., pp. 3, 4):

> ". . . Evidence in the record shows the facilities located in Texas which would allegedly use Houston's gas . . . On an average day their requirements *would exceed the average day volume to be purchased* from Houston by 6.091 M²cf per day *and on a maximum day would exceed the supply* by 31.879 M²cf per day. To give some semblance of physical delivery of Houston's gas to the existing stations, El Paso proposes to rearrange its station fuel piping at certain stations . . .
>
> The record also shows the compressor stations, 22 in number, located in New Mexico and Arizona, which would allegedly use Lo-Vaca's gas. Their requirements under the March 15, 1960 contract *would exceed the gas purchased from Lo-Vaca* by 21.373 M²cf per day *on an average day* and

> by 36.549 M²cf per day *on a maximum day.* However, the record makes it clear that *because of commingling,* the gas from Houston and Lo-Vaca would in part be consumed by El Paso either within or outside of Texas and would in part be carried on to El Paso's customers in New Mexico, Arizona and California . . ." (Emphasis Supplied)

El Paso submits that in the foregoing part the legal significance of commingled gas supplies from the interstate commerce aspect has been disposed of to the conclusion that the Commission's exclusive reliance thereon has been misplaced. El Paso, in this part submits that the Commission's conclusions of fact on the evidence does not

correctly nor completely reflect the state of the record as developed below.

4. *The Evidence of Record.*

It is clear that if, when the project becomes operative, El Paso can and will perform its obligations under its restricted use contracts with both Houston and Lo-Vaca and they, in turn, can and will deliver to El Paso only Texas produced gas, then the proposed sales are, under applicable law hereinafter set forth, non-jurisdictional. This is the crucial factual situation. However, the evidence is undisputed that the parties to these contracts can and will perform these contractual obligations.

The evidence, pertinent to decision of the jurisdictional question, produced at the hearings may be briefly summarized as follows: All of this restricted use gas is produced in Texas (R. 128, 26). It will be commingled in Supply Company's line after accurate metering thereof at the point of delivery, transported to Sonora and further thereafter transported through existing and proposed facilities commingled

with other Texas produced gas (R. 114, 118, 122). As the Commission cites, El Paso will at all times utilize from the common stream an amount for fuel for its plants in Texas and for the Phillips plant in Texas in excess of the amount purchased and received from Houston (R. 128, 343). Again, the Commission agrees that El Paso will also consume as fuel in its plant outside Texas at all times from the common stream an amount in excess of the amount purchased and received from Lo-Vaca under the restricted use contract (Exh. 7, 8). Fuel uses at all of such plants will be separatedly metered (R. 125, 126, 218, 181, 328, 343). This is the only way to determine the fuel uses as,

following commingling, one cannot either prove or disprove that a particular molecule of gas was so employed or remained in the commingled stream (R. 344). It should be recalled, parenthetically, that metering is the accepted and standard method for determining non-jurisdictional pipeline sales effected from the common stream. The existing and proposed pipelines of both Supply Company and El Paso which will be utilized to transport the Houston gas to points of ultimate consumption thereof at plants wholly within the State of Texas as well as the locations of those plants and the Phillips plant all within the State of Texas are graphically portrayed in Exhibit 6. Not all of El Paso's existing plants in Texas will be so employed and such other plants could, if necessary, consume portions of the Houston gas as fuel (R. 138, Ex. 6). It is thus apparent that through existing and proposed facilities Houston's Texas produced gas may be transported wholly within Texas in a continuous flow downstream from the delivery point and delivered to designated existing and proposed plants,

all within the State of Texas, without any of the commingled stream of only Texas produced gas ever leaving the State of Texas or having injected therein any gas produced in any state other than Texas (Ex. 6, R. 139, 140). The only possibility of injection into the gas stream of gas produced outside the State of Texas would be with reference to Lea County, New Mexico, produced gas. After construction of the proposed 16 inch line shown in red on Exhibit 6 connecting Keystone main line station with the El Paso station, it will be impossible for Lea County gas to enter that proposed line (R. 349). The specific existing and proposed plants of El Paso in Texas in which Houston gas will be consumed as fuel and the plants in New Mexico and Arizona in which Lo-Vaca's restricted use gas will be used for fuel

are identified (Exs. 7 and 8, R. 141). The actual fuel requirements of such plants and the estimated fuel requirements of the proposed plants on both an average and a peak day appear on the flow diagrams, Exhibits 7 and 8. The directions of the flow on each of such days is shown by the red arrows, particularly identifying the respective flows of the Houston and Lo-Vaca restricted use gases. It is evident therefrom that the Houston gas will flow only in Texas while the Lo-Vaca restricted use gas will flow both in Texas, New Mexico and Arizona (Exs. 7 and 8; R. 145-147). It thus conclusively appears that on both the average and peak day the fuel requirements of the specified plants exceed by wide margins the volumes of gas to be purchased by El Paso for such use from both Houston and Lo-Vaca (Exs. 7 and 8; R. 149-150). It thus appears that through existing and proposed facilities El Paso can and will perform its contract obligations with both Houston and Lo-Vaca (R. 148). El Paso can and will

1150

so perform even on a minimum day. No exhibit was submitted respecting minimum day fuel requirements of these plants or a flow diagram applicable to such a day because of the difficulty of accurately determining a minimum day because of the possibility of equipment failure (R. 341). At all times, however, even on a minimum day, Houston and Lo-Vaca's restricted use gas will be used only for fuel in the specified plants strictly in accordance with the respective contract provisions (R. 158). El Paso at all times and even on a minimum day can and will regulate its takes from both Houston and Lo-Vaca to assure that it takes from neither any greater quantities than it will burn as fuel in the plants at which it will consume the respective gases. Only such quantities and no more will ever be taken. El Paso has the means to assure this and be on the safe

side (R. 356). The aforesaid flow diagrams were augmented by flow diagrams showing El Paso's Southern system design capacity and its Permian field design capacity (Exs. 9 and 10). Detailed engineering design data are shown to demonstrate, after operation of this project, the capacities of the two systems to accept deliveries of the restricted use gases of Houston and Lo-Vaca, to transport them as contractually required, to deliver them to the specified plants at which they will be consumed as fuel and otherwise to perform El Paso's contractual obligations (R. 159). El Paso will do whatever is required to perform its contract obligations (R. 266-267; 272, 307). Separate meters will be employed to accurately measure the quantities received by El Paso from Houston and from Lo-Vaca under each of its two contracts (R. 25, 343). Separate meters will record the receipt of other Texas produced gas entering the gas stream and separate meters will record the deliveries to the plants at which the restricted

1151

use gases of both Houston and Lo-Vaca will be consumed as fuel (R. 343). Such metering is the only method by which direct sales for non-jurisdictional fuel consumption uses may be established. It is not possible to demonstrate on a molecular basis that particular molecules attributable to identified vendors were or were not so employed (R. 332, 343). In a few relatively minor and insignificant instances, proposed fuel lines will constitute duplicates of existing facilities (R. 354). Proposed construction of such duplicate facilities to accomplish the contractual obligations respecting restricted use for fuel is not relevant to the jurisdictional issue here presented. This record shows, additionally, that other existing plants in Texas could be specified. Duplicating of fuel lines might thus be avoided. Most importantly, when this project becomes operative, the

quantities of gas now being consumed as fuel in existing plants and stations of El Paso become available to the system and to the customers served thereby. There will be no cut back (R. 370). The necessary effect is an increase in system capacity in large amounts and access to the prolific reserves of South Texas. Title to the gases proposed to be delivered under each of these restricted use contracts passes to El Paso at the delivery point near Three Rivers, Texas, by the express provisions of each of the contracts. Each company, in the contracts, warrants its title to and ownership of the gas prior to delivery thereof to El Paso free of liens or incumbrances and further warrants its right to sell the gas to El Paso. All of these contractual provisions are now effective despite the apparent confusion of Mr. Ware when testifying (R. 47-50). All of the contracts supporting the dedication of the reserves

committed by Lo-Vaca to its contracts with El Paso have been executed between Lo-Vaca and the producer (R. 53).

5. *On the basis of the evidence of record therefore the following facts are established:*

(a) The entire courses of the dealing as between El Paso and Lo-Vaca clearly establish the existence (as between the proposal conceded to be jurisdictional and that contended to be not subject to the jurisdiction of this Commission) of the *bona fide* distinctions of separate negotiations, separate contracts, separate billings, separate allocation of gas and effective separate measurement facilities.

(b) That although insofar as the purchases by El Paso from Lo-Vaca making up the composite gas stream are indistinguishable to the extent of being suscep-

tible to determination of the precise identity of the parts making up the whole, the proportions of the volumes contended by the parties to be non-jurisdictional as against the volumes concededly jurisdictional are known and that of either may readily be transported without affecting the transportation or sale of the remainder.

(c) The entire course of dealing leading up to the

1153

proposal of Houston, as between El Paso and Houston definitely and clearly establish the existence of the significant physical and legal distinctions of the existence of a separate and individual rate for the gas to be purchased (Op. 348, mimeo. p. 2); separate billings; separate negotiations; separate allocation of gas; and effective separate measurement facilities.

(d) There is no commingling in the sense of loss of identity of intrastate gas volumes to be consumed in Texas *versus* interstate gas to be transported and sold to others elsewhere, because the intrastate volumes are to be accurately measured upon receipt and consumption by El Paso; El Paso's intrastate facilities are more than competent to receive and utilize such intrastate deliveries; and such intrastate volumes are to be separated from the gas stream and metered before any portion of the gas stream has left the State of production.

1154

6. *The Commission attempts to exceed its jurisdiction as delegated under the Natural Gas Act and to repudiate its own established precedent laid down in conformity with the law*

The Commission in its Opinion No. 348 and its accompanying order, seeks at once to expand the abridged position as taken therein to cover the seemingly extremely broad area as to that which encompasses the question of "... *What constitutes interstate commerce* and *our jurisdiction under the Natural Gas Act.*"

It would appear that both areas have been delineated both by the courts and the Commission. Accordingly, these areas are not new, and have been authoritatively exhausted.

The foregoing state of the matter seemingly is recognized by the Commission in Opinion No. 348 where it states (mimeo. p. 5):

> "... In reaching this conclusion, we are cognizant of the fact that there exist in the natural gas industry arrangements whereby companies transport natural gas for other companies, commingling it with gas from various sources. *Although under some of the transportation arrangements, gas is purchased by the ultimate recipient directly from producers,* generally there is no earmarking of specific gas to the ultimate destination. The delivering company is simply obligated to deliver a specified volume ... *It is not our intention by this opinion to disturb such transportation arrangements ...*" (Emphasis added)

It can only be presumed that the Commission sought to distinguish the present proposals from essentially similar circumstances

1155

which have been presented and certificated by the Commission without it therein having laid claim to jurisdiction over the producer-sellers. That is, the Commission seems to state that it is aware that it has approved arrangements

whereby *interstate* companies transport gas for a third party purchased by it in turn from an *intrastate* supplier, but that in such circumstances the sale is not a sale for resale in interstate commerce and therefore distinguishable.

El Paso submits that the Commission in its action was erroneous in determining jurisdiction in Opinion No. 348, whereas it has disavowed jurisdiction on occasions in circumstances far less clear and convincing than those here present. By way of illustration, the Commission passed upon the following stated arrangement in its Opinion No. 301 issued December 28, 1956, 16 F.P.C. 118, 121:[1]

> ". . . Under the parties' present proposals, Coastal would initially constitute Houston Gas' sole source of supply and the latter in turn would constitute Coastal's sole market . . .
>
> However, a substantial part of the foregoing volumes —some 150,000 Mcf per day average—would consist of "transportation" gas, that is gas delivered to two large Florida power companies for use as boiler fuel in generating electricity. This gas transportation arrangement is a distinguishing feature of applicants' proposals. Under it, gas is purchased by the power companies, Florida

> Power & Light Co. (Florida Power & Light) and Florida Power Corp. (Florida Power) in producing fields in Texas and Louisiana. Received initially by Coastal, it is transported by Coastal and Houston Gas

[1] *Houston Texas Gas & Oil Corp.* and *Coastal Trans. Corp.*, Docket Nos. G-9262 and G-9960; reh. den., 17 F.P.C. 542; aff'd. 251 F. 2d 643, *cert. den.* 356 U.S. 959, *C.f. Transcontinental Gas Pipe Line Corp.*, Docket No. G-13143, 21 F.P.C. 138, 141, aff'd. 271 F. 2d 942; 365 U.S. 1.

successively for a charge to its delivery point to the power companies in Florida . . ."

In the foregoing circumstances, the purchaser in the fields of certain states was the consumer in another state, with the gas being commingled in interstate transit with gas destined for resale sale. Yet, in these circumstances, the Commission refused to extend its jurisdiction to the point of attempting to exercise its authority over the sale by the producers and purchase by the power companies of the large gas volumes involved. It seemingly can do no less here where the facts are even more clear and distinct. Here, militating against claim of jurisdiction, there is no third party purchaser as between the pipeline-transporter and the producer-supplier. Neither is there interstate transmission, at least in the instance of the Houston proposal. No transportation rate is involved. There is no competition between a pipeline and a large volume, non-jurisdictional direct purchaser of natural gas in the field. *Transcontinental Gas Pipe Line Corp.*, Docket No. 13143, *et al., supra,* 21 F.P.C. at 141.

By reason of the foregoing, El Paso respectfully suggests that the Commission in the issuance of Opinion No. 348 and accompanying order has exceeded its jurisdiction under the Natural Gas Act, and in so doing has overthrown clear and long established principles of law and its own body of precedent.

1157

7. *The Commission's unlawful extension of jurisdiction contravenes the Act and is not supported by the cases cited*

a. *Limit of Commission's Authority to Regulate Commerce*

In its decision in *Oklahoma Natural Gas Company, et al.*, 23 F.P.C. 531, in response the the objection that it had based

jurisdiction on "affecting consumers beyond the state boundary," the Commission stated (p. 534):

> "We did not base our jurisdiction on its 'affecting' commerce, but on Oklahoma Natural's transportation and sale being in interstate commerce as part of a transaction essentially interstate with interstate consequences. The term 'interstate commerce' is defined in Section 2 of the Natural Gas Act to mean 'commerce between any point in a state and any point outside thereof. This, in our opinion, is the case here. We cited, *Gibbons* v. *Ogden*, 9 Wheat. 1, 194 to further define the concept of interstate commerce. We had no intention of implying that we had power to extend our regulation to the full extent of the Constitutional power over commerce."

By the foregoing language, the Commission clearly acknowledges the limitation imposed upon its jurisdiction by Section 2(7) of the Act. Therefore, the cases cited by the Commission in definition of the term "interstate commerce" in an effort to establish its jurisdiction in the case at bar are wholly inapposite, for they give content to the "full extent of the Constitutional power over commerce" and thereby transcend the less comprehensive standard of the Act. The Commission cannot in this manner extend its jurisdiction beyond that conferred upon it by Congress. It may not by administrative

interpretation clothe itself with a power denied by Congress. *Hope Natural Gas Co.* v. *FPC*, 134 F. 2d 287, rev. on other grounds, 320 U.S. 591.

b. *Inapplicability of Cited Cases*

In addition to the foregoing, many of the cases cited by the Commission in its discussion of interstate commerce

are inapplicable for other reasons. For example, the case of *Dahnke-Walker Co.* v. *Bondurant*, 257 U.S. 282, turned upon the fact that the wheat destined for use in Tennessee was to be delivered on board a common carrier in Kentucky. We have no common carrier in the present case. *Chapman* v. *El Paso Natural Gas Co.*, 204 F. 2d 46 (D.C. Cir., 1952). Again, the case of *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, is quoted by the Commission on page 6 of its opinion for the proposition that the sale of gas originating in one state and transported and delivered to distributors in another state is subject to Commission regulation. We have no distributors involved in the case at bar, nor any sale for resale. These examples serve to illustrate the Commission's unwarranted extension of jurisdiction in the case at bar is not supported by the authorities cited and that the Commission has erred in attempting to assume regulatory control over an area that was expressly exempted from regulation.

c. *The Commission is Bound by Applicable Judicial Decisions*

The Commission is required to administer the law as it finds it. As stated in *Phillips Petroleum Co.*, 10 F.P.C. 246, 262:

> "... We must remember that our responsibility is to administer the law as we find it, whether or not

> the result agrees with what some would perhaps like it to be."

The law controlling in the case at bar is that laid down in *North Dakota* v. *F.P.C.*, 247 F. 2d 173 (8th Cir., 1957), *People's Natural Gas Co.* v. *Public Service Commission of Pennsylvania*, 270 U.S. 550 (1926) and *City of Hastings*,

Nebraska v. *F.P.C.*, 221 F. 2d 31 (D.C. Cir., 1954). The Commission is not empowered to reverse or otherwise modify *sua sponte* the law thus declared. Accomplishment of the end sought to be achieved in Opinion No. 348 and the accompanying order rests with Congress. The remedy is amendatory legislation and not administrative construction of the Natural Gas Act so as to bring about a result not contemplated by Congress as interpreted by the courts. *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 515-16 (1949); *Price* v. *Gurney*, 324 U.S. 100, 107 (1945); *A.F.L.* v. *NLRB*, 308 U.S. 401, 411-12 (1940).

D. *Conclusion*

WHEREFORE, by reason of the foregoing and on the grounds advanced herein, El Paso Natural Gas Company respectfully urges the Federal Power Commission to reverse the conclusions contained in its Opinion No. 348 and to modify the order therein contained by disclaiming jurisdiction under the Natural Gas Act over the proposals presented in Docket Nos. CI60-693 and CP61-177.

Respectfully submitted,

EL PASO NATURAL GAS COMPANY
George D. Horning, Jr.
By /s/ GEORGE D. HORNING, JR.
HOGAN & HARTSON
800 Colorado Building
Washington, D. C.
Its Attorneys

Of Counsel:

ALLEN R. GRAMBLING,
HARDIE, GRAMBLING, SIMS
& GALATZAN
EL PASO NATURAL GAS BUILDING
El Paso, Texas

1163

(Filed Nov. 22, 1961)

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Docket No. CI60-693

LO-VACA GATHERING CO.

Docket No. CP61-177

HOUSTON PIPE LINE COMPANY

Application for Rehearing on Behalf of Lo-Vaca Gathering Co.

* * * * * * * * * * *

1164

Lo-Vaca Gathering Co. (Lo-Vaca) hereby files its application, pursuant to Section 19(a) of the Natural Gas Act and Section 1.34 of the Commission's Rules of Practice and Procedure, for rehearing of the Commission's Opinion and Order Determining Jurisdiction issued in these proceedings on October 23, 1961. In support whereof, Lo-Vaca shows as follows:

I

INTRODUCTION

Much of the Commission's opinion issued October 23, 1961, is concerned with a legal analysis of the nature of interstate commerce (Opinion, pp. 5-8). However, Lo-Vaca does not contend that its restricted-use sale to El Paso Natural Gas Company (El Paso) is not in interstate commerce. Admittedly, the sale of gas in Texas for transportation and consumption by the purchaser outside the state is a sale in interstate commerce. Thus, the long line of authorities from *Gibbons* v. *Ogden*, 9 Wheat 1 (U.S. 1824)

through *Lemke* v. *Farmers' Grain Co.*, 258 U.S. 50 (1922) and *Public*

1165

Utilities Commission of Rhode Island v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927) to *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672 (1954) which are cited by the Commission in a partial delineation of the meaning of interstate commerce have no relevance to the Lo-Vaca proceeding.[1] The narrow question presented by Lo-Vaca's restricted-use sale may be stated as follows:

> If a gatherer sells natural gas in the State of Texas to a pipeline company with a restriction that such gas shall be directly consumed by the pipeline outside of Texas, does the Commission gain jurisdiction over the sale by reason of physical commingling by the pipeline of the gatherer's gas with other gas destined for resale outside the State of Texas?

We submit that the Commission erred in concluding that it would gain jurisdiction over Lo-Vaca's direct sale by reason of commingling with gas which would be resold in interstate commerce. Accordingly, we shall relate below the fundamental misconceptions of the Commission's authority under the Natural Gas Act and the misinterpretations of pertinent case authorities which led the Commission to its erroneous conclusion. Preliminarily, however, in order that there may be no mistake having its origin

[1] Only one of the cases cited by the Commission touches upon the question of whether a sale for resale retains its intrastate character through a restriction that the resale must take place within the state of origin. This case is *North Dakota* v. *Federal Power Commission*, 247 U.S. 173 (8th Cir. 1957), which squarely holds that such a restriction on the resale of the gas effectively maintains the intrastate nature of the transaction. (*Id.*, p. 178)

1166

in a misreading of record facts, it is hereby requested that the Commission make express findings as follows:

II

EXPRESS FINDINGS REQUIRED BY RECORD FACTS

Lo-Vaca entered into two contracts with El Paso (Exhibit Nos. B-1 and B-2 to Lo-Vaca's application, Item A by reference). One contract, dated March 15, 1960, calls for the sale of 50,000 Mcf per day subject to the condition that all such gas shall be used by El Paso exclusively as fuel in its compressors, treating plants, boilers, camps, and other facilities located outside the State of Texas (Exhibit B-1 to Item A). In this application for rehearing we shall refer to this contract as the restricted-use contract. It is the subject matter of this application for rehearing. The other contract, dated May 16, 1960, calls for the sale to El Paso of 80,000 Mcf per day. This is an unrestricted sale for resale for which Lo-Vaca requests a certificate of public convenience and necessity (Exhibit B-2 to Item A). The Commission recognizes that no contention is made by Lo-Vaca that the transportation of the gas in interstate commerce is beyond Commission jurisdiction. Lo-Vaca contends only that its restricted-use sale is a direct sale not subject to Commission jurisdiction under Section 1(b) of the Natural Gas Act. *Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana*, 332 U.S. 507 (1947)

1167

The record shows that in all aspects the two Lo-Vaca contracts are entirely separate. It is requested, therefore, that the Commission expressly find:

(1) The gas to be sold by Lo-Vaca to El Paso, the 50,000 Mcf per day which is restricted for consump-

tion by the purchaser and the 80,000 Mcf per day which is unrestricted and available for resale anywhere on El Paso's system, is sold under separate contracts (Exhibits B-1 and B-2 to Item A).

(2) The two sales contracts were separately negotiated (T. 24-25).

(3) The reserves dedicated to the two sales are separate and distinct (T. 64-65).

(4) The volumes delivered by Lo-Vaca are to be separately metered (T. 25, 266-267, Articles VI and VII to Exhibits B-1 and B-2 of Item A).

(5) The volumes are to be delivered at separate delivery points (T. 35, Articles VI and VII to Exhibits B-1 and B-2 of Item A).

Based upon these five fundamental findings, there can be no doubt that Lo-Vaca's two contracts meet the tests of separateness relied upon by the Court of Appeals for the Eighth Circuit in *North Dakota* v. *Federal Power Commission*, 247 F.2d 173, 177 (8th Cir. 1957) and the Court of Appeals for the District of Columbia Circuit in *City of Hastings* v. *Federal Power Commission*, 221 F.2d 31 (C.A.D.C. 1954), and recognized by the Supreme Court in *United States* v. *Public Utilities Commission of California*, 345 U.S. 295, 317-318 (1953). Consequently, on the facts of record, it is only by refusal to adhere to these established precedents that the Commission can assert jurisdiction over Lo-Vaca's restricted-use sale.

III

Established Precedents Require Denial of Jurisdiction

In its opinion the Commission purports to distinguish controlling court cases which, if followed, must result in a

finding that Lo-Vaca's restricted-use sale is non-jurisdictional. In part, the Commission's erroneous conclusion seems to be based upon of fact,[2] in part, they are based upon an improper analysis of the cases. Because of the importance of these cases to the *Lo-Vaca* proceeding, we shall treat each in some detail below.

1. *The Commission misreads controlling procedents.*

First, contrary to the Commission's assertion that *United States* v. *Public Utilities Commission of California, supra,* (hereinafter termed the *California* case) involved a sale of electric energy in the state where consumed, that case involved a direct sale of energy to be consumed in a state other than the state wherein the sale took place. What was involved was a sale in the State of California, by California Electric Company, of electric energy which was transmitted by the purchaser across the state line into Nevada. The energy was then in part, resold, in Nevada and, in part, directly consumed by the purchaser. 345 U.S. at pp. 297-298. Thus, in this respect, contrary to the Commission's statement, the *California* case involved facts directly analogous to those

involved in the proposed restricted use by Lo-Vaca. Both cases involve direct sales in one state for consumption by the purchaser in another state.

What distinguishes the *California* case from the *Lo-Vaca* proceedings is the separability of the direct sale from the sale for resale in the *Lo-Vaca* case. The Supreme Court noted this separability to be lacking in the *California* case

---

[2] See, *e.g.*, Opinion, page 9, with regard to factual situation involved in *United States* v. *Public Utilities Commission of California*, 345 U.S. 295 (1953).

and on that basis permitted federal regulation of the sale for resale to encompass, as a necessary incident, the non-jurisdictional direct sale (345 U.S. 295, 317-318). But where there is a direct sale in interstate commerce entirely separate from a sale for resale in interstate commerce to the same customer, the Court was of the opinion that the direct sale could be regulated separately even though the energy to supply both sales might be commingled (*Id.*).

Thus, we agree with the Commission's statement (Opinion, page 9) that the *California* case "does not involve an interstate commerce question at all, but a possible segregation between a direct sale and resale." We agree in the sense that no interstate commerce issue was raised in that case just as Lo-Vaca is not here contending that its direct or restricted-use sale would not be in interstate commerce. The Commission's admission with regard to the *California* case (Opinion, p. 9) is likewise applicable to Lo-Vava's restricted-use sale. For, just as the direct sale of electric energy to the Navy "would thus have been exempt from our jurisdiction if it had been a separate transaction," the restricted-use sale by

Lo-Vaca to El Paso would be exempt from Commission jurisdiction because it is a separate transaction.

The Commission has also improperly analyzed *City of Hastings* v. *Federal Power Commission*, 221 F.2d 31 (C.A.D.C. 1954). The fact that the direct sale by Kansas-Nebraska Natural Gas Company to the City of Hastings took place in the same state as final consumption has no bearing upon the legal conclusion whether such a sale would be subject to the Commission's jurisdiction. The direct sale to the City of Hastings was a sale in interstate commerce just as the restricted-use sale by Lo-Vaca would be.

The fact that the gas was consumed by the City of Hastings in its own power plant after transportation by the City for a short distance after receipt from the pipeline company did not mean that interstate commerce had ended with delivery of the commingled stream at the city gate. *Pennsylvania Gas Company* v. *Public Service Commission of the State of New York*, 252 U.S. 23, 27-28 (1919).

A review of other pertinent facts of the *City of Hastings* case reveals its real impact upon the factual situation proposed by Lo-Vaca's restricted-use sale, for those facts show that the Commission disclaimed jurisdiction over the direct sale solely upon the separability of contracts doctrine.

Kansas-Nebraska delivered gas to the City of Hastings at the city gate at one delivery point. This gas included the volumes resold by the City for ultimate public consumption. It also included volumes to be consumed in the City's power plant.

At the point of delivery, the jurisdictional direct-use volumes and the resale volumes were in a commingled state as they had been throughout their interstate journey. After delivery to the City, the volumes were transported further in the same commingled stream to a point where the direct-use gas was diverted to the power plant. Obviously, because of the commingling, it could not be determined at the point of delivery whether some of the gas delivered to the City for direct use might physically be resold for public consumption. Despite this fact, the Commission found, on the basis of the separability of the two contracts, that its jurisdiction did not extend to the direct-use contract.

In this regard, the Staff's argument, referred to on page 5 of the Opinion, that buyers and sellers cannot determine

the jurisdictional status of their sales by their contracts is completely refuted. If two parties make a contract for sale wherein it is agreed that the purchaser will consume the gas itself, the Commission has no jurisdiction over that sale. For, as held by the Supreme Court in *Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana*, 332 U.S. 507, 516 (1947), the Commission's jurisdiction is limited to three things only:

(1) transportation of natural gas in interstate commerce;

(2) sales of natural gas in interstate commerce for resale; and

(3) natural gas companies engaged in such transportation or sale.

Contrary to the implication in the Staff's argument, the scheme of regulation provided by the Natural Gas Act did not limit a natural

gas company's right to contract. This power was preserved. *United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, 350 U.S. 332, 338 (1956).

The Commission frankly admits that *North Dakota* v. *Federal Power Commission*, 247 F.2d 173 (8th Cir. 1957) requires that Lo-Vaca's restricted-use sale be determined to be non-jurisdictional. Being unable to explain away the force of that precedent, the Commission seeks to reverse the holding of the Court of Appeals for the Eighth Circuit. But that case, like this, involved sales of natural gas to a pipeline under two different contracts, where the volumes of gas attributable to the jurisdictional and non-jurisdictional contracts were commingled upon delivery to the pipeline. Upon receipt of all volumes by Montana-Dakota

Utilities Company at the outlet of the Tioga Plant, the volumes destined by contract for a non-jurisdictional sale within North Dakota could not be physically distinguished from the volumes destined by a separate contract for jurisdictional sales outside the State of North Dakota. The physical segregation did not take place until the gas was delivered to the four small towns along the route of the interstate pipeline.

In a like manner, Lo-Vaca's restricted-use gas is to be sold under an entirely separate contract from the contract relating to the unrestricted gas. It will be transported in a commingled stream along with the unrestricted gas. However, like the firm intrastate gas in the *North Dakota* case, it is segregated at the

1173

point of consumption.

It may be noted that the Lo-Vaca restricted-use sale differs from the *North Dakota* case facts in two aspects which serve to strengthen the non-jurisdictional nature of the Lo-Vaca sale. First, the *North Dakota* case did not concern a direct sale over which the Commission is denied jurisdiction by statute. That case involved a sale for resale which the Commission and the Court of Appeals held was not subject to the Commission's jurisdiction even though the resale volumes were commingled in an interstate stream. Thus, the doctrine of separability of contracts was applied to determine the intrastate character of the transaction. Parenthetically, in this regard, it may be seen that the *North Dakota* case is directly controlling in the factual situation posed by the proposed sale by Houston Pipe Line Company in Docket No. CP61-177. Manifestly, if the doctrine of separability of contracts determines the intrastate nature of a sale for resale, it also determines the non-jurisdictional nature of a direct-use sale in interstate

commerce. *United States* v. *Public Utilities Commission of California*, 345 U.S. 295, 317-318 (1953).

Secondly, the attributes of separability are more pronounced in the Lo-Vaca proposal than they were in the *North Dakota* case. Thus, separate and distinct reserves are dedicated under the two Lo-Vaca contracts. And, the Lo-Vaca volumes will be separately metered at the proposed delivery points. In the *North Dakota* case there was no separate dedication of reserves and the firm and interruptible volumes were not separately metered at the outlet of the Tioga Plant.

1174

2. *The Commission does not gain jurisdiction because of possible effect upon regulatory powers.*

The partially hidden rationale of the Commission's opinion rises to the surface in its candid remark that if it reached a different conclusion, "our regulation of gas rates would be handicapped." (Opinion, p. 9). The Commission then points out that a pipeline might offer higher prices for the non-jurisdictional gas than would be permitted under the area pricing policy applicable to jurisdictional sales. The short answer, is, of course, that the Commission cannot regulate non-jurisdictional sales because of the effect such sales may have upon regulation of jurisdictional sales. Neither can it achieve the same result by assuming jurisdiction over transactions which are not within the scope of its express statutory power. *Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana*, 332 U.S. 507, 514-518 (1947).

The fact that El Paso may operate an integrated pipeline system for the primary purpose of moving gas from the permian Basin and other sources to consumers in a number of states, does not make jurisdictional a transaction which is excluded by the Natural Gas Act from Com-

mission regulation. *North Dakota* v. *Federal Power Commission*, 247 F.2d 173, 177 (1957).

But, the Commission states, Lo-Vaca's restricted-use sale could not be regulated by Texas (Opinion, p. 9), apparently basing its conclusion on the ground that the sale would concern more states than one. However, by definition, any sale in interstate

commerce concerns "more states than one." Yet, the Commission has regularly conceded that it has no jurisdiction over direct-use sales in interstate commerce as, of course, it must, under Section 1(b) of the Natural Gas Act. For instance, the *Houston-Coastal* proceedings involved sales by producers in Texas to power companies in Florida.[3] Certainly, these sales involved "more states than one."

Furthermore, the Commission has, by its own affirmative action granting abandonment, recognized that a direct-use sale is not subject to its jurisdiction even though the direct-use gas is commingled in an interstate stream with other gas sold for resale. Thus, in *Hope Producing Company, et al.*, Docket Nos. G-15537, *et al.*, order issued February 3, 1959, the Commission permitted the abandonment of a sale for resale by Hope Producing Company to Arkansas Louisiana Gas Company (Arkansas Louisiana). Concurrently, Arkansas Louisiana discontinued its sale to Southwestern Electric Power Company. In substitution therefor, Hope Producing Company continued deliveries to Arkansas Louisiana for the account of Southwestern Electric Power Company. The transportation by Arkansas Louisiana continued to be subject to the Commission's jurisdiction but what had formerly been a sale for resale subject to the Commission's jurisdiction became a non-jurisdictional

[3] *Houston, Texas Gas and Oil Corporation and Coastal Transmission Corporation*, 16 F.P.C. 118 (1956).

1176

sale by reason of the new contractual arrangements.

Further, the consistent failure of the Commission to exert jurisdiction over direct-use sales indicates that the Commission does not believe that the power exists. *Federal Power Commission* v. *Panhandle Eastern Pipe Line Company*, 337 U.S. 498, 513 (1949); *City of Hastings* v. *Kansas-Nebraska Natural Gas Company*, 12 F.P.C. 12, 18 (1953). This is evidenced by the Commission's recommendations to Congress that its authority be broadened to include certificate control over direct-use sales. (See, *e.g.*, Thirty-second Annual Report of the Federal Power Commission, p. 152 and Thirty-third Annual Report of the Federal Power Commission, p. 154). The fact that Congress has not granted this request is firm indication that the Commision may not exercise jurisdiction over such sales.

3. *Commission assertion of jurisdiction would deny legal consequence of fungibility.*

Essentially, in holding that Lo-Vaca's restricted-use gas is jurisdictional merely because it is commingled with gas transported and sold for resale in interstate commerce, the Commission negates the concept of fungibility. Yet, we do not understand the Commission to hold that natural gas is not a fungible commodity (See, *Black's Law Dictionary*, 4th Ed. 1951).

We submit that a basic consequence of fungibility of natural gas is the legal right of contracting parties to assume separate identity of volumes of gas even though commingling may erase any separate physical identity. A contrary conclusion would

1177

deny logic to the entire line of cases beginning with *People's Natural Gas Co.* v. *Public Service Commission of*

Pennsylvania, 270 U.S. 550 (1926) where the Court held at pages 554-555:

> "As respects the Pennsylvania gas we think it must be held to be in intrastate commerce only. Feeding it into the same pipe lines with the West Virginia gas works no change in this regard. Of course, after the commingling, the two are undistinguishable. But the proportions of both in the mixture are known, and that of either readily may be withdrawn without affecting the transportation or sale of the rest. So for all practical purposes the two are separable, and neither affects the character of the business as to the other."

In this regard, the Commission's attention is also directed to the opinion of the Court of Appeals for the Fifth Circuit in *Federal Tender Board No. 1* v. *Haynes Oil Corporation*, 80 F.2d 468 (5th Cir. 1935). That case involved "contraband oil" which had been commingled with oil which had been produced in accordance with conservation laws of Texas and hence not "contraband." The Board contended that each barrel of oil in the commingled total was composed in part of the contraband oil and was contaminated by it. Significantly, the Court held that if the entire tank of commingled oil had been tendered, the Board would have been correct. However, the tender was only for amount equal to the lawfully produced oil in the commingled total. Noting that the proportion of lawfully and unlawfully produced oil was known, the Court concluded that both "justice and practical convenience will best be served by allowing a separation as is proposed. * * *. Commingling and proportionate separation is daily practiced in

the business of grain elevators, pipe lines and the like. We see no reason why the practice is not proper here." 80 F.2d at p. 469.

From the foregoing, the Commission should not misconstrue our contention as being one of denial of jurisdiction over transportation of natural gas in interstate commerce or over sales for resale in interstate commerce because of commingling of such jurisdictional gas with direct-use or interstate gas. Nor do we contend that the Commission may not, on proper facts, such as those involved in the *California* case, regulate a sale for resale in interstate commerce when the contract for such sale includes gas which may be consumed directly by the purchaser. But, when carefully tailored transactions, made in reliance upon court and commission precedents, have contractually separated jurisdictional from non-jurisdictional volumes, as Lo-Vaca has done here, the concept of fungibility provides legal basis for the conclusion that the volumes are to be treated as separate in fact.

Accordingly, we urge that the Commission expressly recognize that natural gas is a fungible commodity and accept the legal consequences which necessarily follow. In doing so, the Commission will reaffirm its own position and follow the court decisions in the cases discussed above, such as the *City of Hastings* case, the *North Dakota* case, and the *Houston, Texas-Coastal* proceedings, without derogating from its jurisdiction as determined in the *California* case.

1179

IV

There Is No Record Basis for a Finding That Lo-Vaca Is a Pipeline Company.

On page 10 of its Opinion, the Commission concludes that Lo-Vaca and Houston "would be pipeline companies." There is no basis in evidence for that conclusion. For, in the sentence immediately preceding its conclusion, the Commission, itself, finds that "Lo-Vaca proposes to build a system of lines which will receive the gas from the pro-

ducers, transport it and deliver it ~~at Coq~~uat, *but the record is not sufficient to determine here whether it is a 'pipeline company'* in addition to being a natural gas company and it is not necessary to do so." (Emphasis supplied.)

Accordingly, since the Commission's conclusion is contradicted by its own express finding, it is submitted that the conclusion is erroneous and should be eliminated.

V

Conclusion

Wherefore, for the foregoing reasons, it is requested that the Commission grant rehearing in these proceedings and upon rehearing take the following action:

(1) make the express findings of fact set forth in Section II above;

(2) reverse its determination that Lo-Vaca's restricted-use sale to El Paso would be subject

to its jurisdiction and hold that the sale would be a direct-use sale and, as such would not be subject to its jurisdiction; and

(3) delete its conclusion that Lo-Vaca would appear to be "a pipeline company" as being without record support.

Respectfully submitted,

Lo-Vaca Gathering Co.

By /s/ Bradford Ross
Bradford Ross
Ross, Marsh & Foster
725 15th Street, N. W.
Washington 5, D. C.
Its Attorneys

Dated at Washington, D. C.
this 22nd day of November, 1961.

1184

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman; Jerome K. Kuykendall, Howard Morgan, L. J. O'Connor, Jr. and Charles R. Ross.

Docket No. CI60-693
LO-VACA GATHERING COMPANY

Docket No. CI61-177
HOUSTON PIPE LINE COMPANY

Order Denying Rehearing

(Issued December 12, 1961)

Applications for rehearing were filed by Houston Pipe Line Company on November 21, 1961, and by Lo-Vaca Gathering Company and El Paso Natural Gas Company on November 22, 1961, to our Opinion No. 348 and order issued October 23, 1961, determining that we would have jurisdiction over proposed sales of natural gas to be made by Houston and Lo-Vaca to El Paso. It is alleged that the gas involved would be produced in Texas and delivered to El Paso in Texas. Contractual arrangements purported to provide that Houston's gas would be consumed in Texas by El Paso's compressor stations and a gasoline plant of Phillips Petroleum Company, while Lo-Vaca's gas would be consumed in El Paso's compressor stations outside of Texas. The record showed that Houston's and Lo-Vaca's gas would in fact be commingled with other gas in El Paso's system and would be consumed in part by El Paso either within or outside of Texas and would in part be sold to El Paso's customers in other states. The applications for rehearing do not raise points that were not fully discussed in our opinion. However, we may note the separate bases of our conclusions.

We conclude that where the specific gas sold in Texas would in part be physically transported to another state and resold, the sale in Texas would be a sale for resale in interstate commerce and subject to our jurisdiction regardless of contractual arrangements and declaration of intention by the parties that the gas is to be used in Texas or consumed by the pipeline. We adhere to this view, but even if we did not hold to it, we would still find that the sales here were subject to our jurisdiction on the separate ground stated in our opinion relating to the nature of El Paso's own system. That is, a sale of natural gas to an integrated, interstate pipeline system which uses the gas for system purposes and physically transports and resells at least part of the gas to customers in other states is a sale in interstate commerce for resale.

We may add that we are not unaware of *Peoples Natural Gas Company* v. *P.S.C.*, 270 U.S. 550, cited by the applicants for rehearing. That case, of course, concerns gas produced in Pennsylvania, delivered into an interstate pipeline in Pennsylvania and sold wholly in Pennsylvania commingled with gas brought in by the pipeline from West Virginia. The Court held that the Pennsylvania Commission had authority to order the delivery of gas from the interstate pipeline that was less in quantity than that Pennsylvania produced gas. In the *Peoples* case there was no chance that any of the gas in the pipeline in Pennsylvania could leave the state; in the present case there was no chance that part of Houston's and Lo-Vaca's gas would not be carried out of the state and sold for resale.

The Commission further finds:

The assignments of error and grounds for rehearing set forth in the applications for rehearing filed by Houston,

Lo-Vaca and El Paso set forth no new facts or principles of law which were not fully considered by the Commission when it issued its opinion and order of October 23, 1961, or which, having now been considered, warrant any modification of the said opinion and order.

The Commission orders:

The applications for rehearing of the Commission's opinion and order issued herein October 23, 1961, are hereby denied.

By the Commission. Commissioner O'Connor dissenting for the reasons set forth in Opinion No. 348 and order issued October 23, 1961.

J. H. GUTRIDE
Joseph H. Gutride,
Secretary.